Supreme Court, U.S.
FILED

No. 931663 APR 21 1994

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RANDELL P. MEANS,
Assistant United States Attorney,
in his individual capacity,
Petitioner,

v.

BRENDA CHILCUTT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 21, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

1606P

QUESTION PRESENTED

Whether the court of appeals engaged in improper appellate fact-finding—doing grievous harm to the reputation of petitioner, an Assistant United States Attorney—in finding that petitioner "intentionally withheld documents" and "knowingly engaged in blatant misrepresentations to the district court about the existence of those documents," when the district court, after an evidentiary hearing, declined to make such findings.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, respondents include Home Indemnity Company, appellee below, and the United States of America, appellant below, which is a respondent under this Court's Rule 12.4.

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Randell P. Means, in his individual capacity, hereby petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-30a) is reported at 4 F.3d 1313. The following orders of the district court are not reported: the May 26, 1992 order compelling discovery (App. 31a-34a); the June 2, 1992 order setting the amount of sanctions and ordering petitioner not to seek reimbursement from the Department of Justice (App. 35a-36a); the June 4, 1992 order sanctioning the United States (App. 37a-38a); the June 6, 1992

order denying a stay of execution (App. 39a-43a); the July 1, 1992 order scheduling a preliminary hearing concerning possible issuance of a show cause order (App. 44a-52a); and the July 28, 1992 order sanctioning petitioner Randell P. Means (App. 53a-54a). The order of the court of appeals denying petitioner's petition for rehearing, entered on December 22, 1993, (App. 55a) is not published. The transcript of the July 28, 1992, hearing is appended hereto (App. 56a-119a).

JURISDICTION

The court of appeals rendered its opinion on October 25, 1993. A petition for rehearing was denied on December 22, 1993. On March 16, 1994, Justice Scalia extended the time for the filing of a petition for a writ of certiorari until April 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case presents an extraordinary instance of impermissible appellate fact-finding by the court of appeals, which will result in irreparable harm to the reputation of an Assistant United States Attorney unless corrected by this Court. In affirming an order permanently enjoining petitioner from applying under 28 C.F.R. § 50.15(c)(1) for reimbursement of an award of discovery costs under Fed. R. Civ. P. 37(d), the court of appeals repeatedly resolved factual disputes that the district court—after observing the witnesses—failed to resolve or resolved contrary to the conclusion reached by the court of appeals. As a result of its improper usurpation of the district court's role, the court of appeals decided this case on an incorrect basis. The legal error in the scope of appellate review is so manifest, and its conflict with the controlling standards established by this Court so stark, that this Court should summarily reverse the judgment of the court of appeals and remand the case for further proceedings.

1. *Proceedings Before the District Court.* On October 4, 1988, respondent Brenda Chilcutt [1] fell and was injured while she was a patron at the River Bend Post Office in Fort Worth, Texas. She and her workers' compensation insurer, respondent Home Indemnity Company, unsuccessfully pursued administrative claims with the United States Postal Service, and, in April 1991, filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2401 *et seq.*[2] The action was brought in the United States District Court for the Northern District of Texas, and was assigned to United States District Judge John H. McBryde. Chilcutt alleged that her fall and injuries were due to negligence on the part of the United States in failing to maintain the floor of the post office in a safe condition, including allowing it to remain wet.

a. Petitioner, Randell P. Means, an Assistant United States Attorney employed in the Northern District of Texas, was assigned to defend the case on behalf of the United States. He has been an AUSA since 1987 and during that time he has tried more than 20 cases for the United States. Prior to joining the U.S. Attorney's office, petitioner had been a state prosecutor for more than seven years and had tried more than 50 criminal cases in state court. During all of that time, with the exception of this case, he has never been sanctioned by any court and has never had an ethical complaint lodged against him. At the time of this litigation, petitioner was responsible for approximately 100 other cases.

The district court entered a scheduling order setting a discovery cut-off date of May 8, 1992, and a trial date of June 8, 1992. Plaintiffs undertook no discovery until

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[1] Since the outset of this litigation, Brenda Chilcutt was married, and she has taken the name Brenda Wortham. For the sake of convenience, we refer to her as Brenda Chilcutt.

[2] The United States, the named defendant below, has not filed a petition for a writ of certiorari on its own behalf, and is therefore a respondent in this Court under S. Ct. Rule 12.4.

March 24, 1992, when they served a set of interrogatories and requests for production of documents on the United States. The government's responses were due on April 23, 1992, about two weeks before the court-imposed discovery deadline. On May 19, 1992, after petitioner failed to respond to the pending discovery request in a timely fashion, plaintiffs filed a motion to compel discovery and for sanctions under Fed. R. Civ. P. 37. As a sanction, plaintiffs sought the imposition of a default judgment.

The district court scheduled a hearing on that motion for May 22, 1992. Between the May 19 motion and the May 22 hearing, petitioner produced relevant documents and served answers to plaintiffs' interrogatories. Plaintiffs' counsel, Kelly Robbins, remained dissatisfied with the government's response to her discovery requests. Robbins complained that the government had failed to produce all the requested documents and had given incomplete interrogatory answers.

When asked to explain why there had not been timely compliance with discovery, petitioner stated that it was due to a "combination" of the Postal Service not having provided the information and documents quickly enough and petitioner's own fault in failing to respond with the incomplete information he had. Petitioner also explained that much of the information sought by plaintiffs' March 24, 1992 discovery requests had effectively been provided to plaintiffs in a timely fashion when Postal Service investigator Al Svede was deposed on April 22, both through Svede's testimony and in response to a subpoena *duces tecum* that he complied with at that time. 5/22/92 Tr. 28-31.

At the conclusion of the May 22 hearing, the district court ordered the government to produce by no later than May 27 all the documents requested by plaintiffs. App. 33a.[3] In addition, the district court ordered petitioner

[3] In addition, the court ordered petitioner to arrange for plaintiffs to depose an independent contractor who was responsible for

personally to file an affidavit stating that the documents he had produced constitute all the responsive documents within the government's possession and control. *Id.* at 33a-34a. The court also ordered petitioner to certify that he had made inquiries of Postal Service employees and agents that were calculated to disclose the existence of all documents responsive to the plaintiffs' document requests. *Id.* at 34a.

Turning to plaintiffs' motion for sanctions, the court deferred ruling on the request for a default judgment. *Id.* at 35a. Due to "the government's failure to respond to discovery," however, the court ordered petitioner to pay the costs and attorney's fees incurred by plaintiffs in connection with the motion to compel, as well as with regard to the deposition of the independent contractor. 5/22/92 Tr. 38. The court expressly relied only on Rule 37(d). Although the court made no findings concerning the relative fault of the Postal Service and petitioner with respect to the discovery lapses, the court ordered the plaintiffs' expenses reimbursed and that they be paid by petitioner *personally*, and not by the government. The sole rationale offered by the court—at that time or any other point throughout the litigation—for that part of its order was its conclusion "that this sort of thing should [not] be borne by the taxpayers." *Id.*[4] Because plaintiffs' counsel,

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the care and maintenance of the floors at the River Bend Post Office. App. 34a. Petitioner had not interviewed the independent contractor prior to answering plaintiffs' interrogatories, and had therefore responded to certain of plaintiffs' interrogatories by stating that information within the contractor's possesson was not yet known. Although the independent contractor was not an employee of the Postal Service, and was therefore equally accessible to plaintiffs' counsel, the court concluded that it was petitioner's responsibility to interview her before responding to plaintiffs' interrogatories. *See* 5/22/92 Tr. 10-16.

[4] On June 6, 1992, the court entered an opinion and order denying the government's motion for a stay of the order that petitioner pay the sanctions personally, and in that opinion the court reiterated—

Robbins, had not had time fully to digest the discovery responses provided by the government to that point, the court invited her to file a supplemental motion to compel or for sanctions if she remained dissatisfied with the government's production. *Id.* at 36.[5] On May 27, the government responded further to plaintiffs' discovery requests. In addition, petitioner filed an affidavit certifying that he had produced all the responsive documents, and had made an investigation calculated to lead to the discovery of all such documents within the government's custody or control.

On June 1, 1992, the court held a hearing to set the amount of the fees that it awarded to plaintiffs at the May 22 hearing. The court concluded that $2500 was appropriate, and ordered petitioner to pay that amount to plaintiffs' counsel. The court also ordered petitioner to execute an affidavit stating that the payment was "being made with his personal funds and that he has not sought, and will not seek, receive or accept, reimbursement from the United States government for the payment he makes." 6/1/92 Tr. 23.[6] Finally, the court noted that it was "holding in abeyance the matter of sanctions to impose on the defendant." *Id.*

b. Two documents are central to an understanding of the appellate fact findings in this case. The first is a log of accidents at post offices maintained by Svede, the acci-

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but did expand upon—its taxpayer-protective rationale for that part of its sanctions order. *See* App. 41a-43a.

[5] The district court's oral rulings were memorialized in an order dated May 26, 1992. App. 33a.

[6] Pursuant to Department of Justice policy, *see* 28 C.F.R. § 50.15, petitioner sought and obtained government counsel to represent him at the June 1 hearing. The district court expressed displeasure at the fact that petitioner was represented by government counsel, and instructed the Department of Justice to file a statement detailing the costs to the government of providing petitioner with counsel. 6/1/92 Tr. 12-13, 15-16. The government provided such a statement, but the court took no further action on the point.

dent investigator employed by the Postal Service who was involved in investigating Chilcutt's accident. A copy of that log, which in its original form consisted of two oversized pages, is reproduced in the appendix for the Court's convenience. App. 120a. The second is a Form 1769, which is an accident report form that plaintiff Chilcutt claimed that she had filled out after her accident and submitted to Iona Smith, a postal employee at the River Bend Post Office. Smith testified specifically that she never gave Chilcutt any Form 1769 to fill out and that Smith never received such a form from her. 6/4/92 Tr. 85-86.

On June 1, 1992, plaintiffs, believing that the Postal Service possessed the Form 1769 and accident logs referring to the accident in question, filed a supplemental motion to compel production of these documents and other discovery materials and for sanctions. On June 3, petitioner filed a lengthy and detailed response to this motion. Among other arguments, the response denied the existence of the Form 1769 and, referring to plaintiffs' "complain[t] that Al Svede has not produced his own log," stated that "[d]efendant has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's [document] request." App. 7a n.11 (quoting Defendant's Response: Plaintiff's Supplemental Motion for Sanctions). On June 4, the district court held a hearing on the motions. Although the district court rejected many of plaintiffs' complaints as "nit-picking," the court had questions about the government's failure to produce Svede's accident log and its failure to produce a copy of Chilcutt's Form 1769. *Id.* at 31, 36-37, 39, 50-51, 60-61.

At the hearing, during the morning of June 4, petitioner represented to the district court that the Postal Service's accident logs contained no reference to Chilcutt's fall, nor to any other accidents at the River Bend Post Office. That representation was based on repeated conversations petitioner had with Svede, who was designated

as the representative of the United States in the litigation. The only accident logs that had been provided to petitioner were Safety Office logs maintained by Robert Kunkel, another Postal Service employee. Petitioner had personally inspected the Kunkel logs, and determined that they did not refer to the Chilcutt fall or to any other accident at the River Bend Post Office. During the morning part of the June 4 hearing, all of petitioner's references to "logs" referred to Kunkel's. App. 65a-68a, 76a-78a, 82a-83a, 87a-88a. At that point, petitioner was unaware of a separate log maintained by Svede. See *infra* p. 12. Because petitioner believed that the Kunkel logs were the only accident logs in existence and because he had examined those logs and verified that they contained no information responsive to plaintiffs' document requests, petitioner stated to the court unequivocally that the government had fully complied with its discovery obligation.

Portions of petitioners' representations to the trial court on the morning of June 4 are quoted at length in footnote 12 of the court of appeals' opinion (App. 7a), and formed the basis for that court's mistaken factual finding that petitioner must have been referring to, and must have personally reviewed, the Svede logs in making what the court concluded were misrepresentations to the district court. After observing that "Means stated that he had checked the log in question," the court of appeals quoted his statement that "there is no record in those logs relating to any accident or complaint on the premises of River Bend for the time—", at which point the district court interrupted petitioner. Continuing, the court of appeals quoted petitioner (App. 8a (italics and brackets supplied by court of appeals)):

> *I am stating under oath before the court as an officer of the court . . . that a search of that log has been conducted, and no accident has been identified to the time periods in that log—and I believe it's 1987 through the present—for the premises, River Bend [post office], for both employee accidents or complaints or customers accidents.*

The contents of the Svede log (App. 120a), however, reveal that it covers only accidents occurring between "10/7/88" through "9/7/89." In fact, only the Kunkel logs—and not the Svede logs—cover accidents reported "for the time period 1987 through the present." R. 436.

At the end of the morning hearing on June 4, the district court decided to hear testimony directly from government witnesses regarding the existence of the disputed documents, and ordered petitioner to produce Iona Smith and Al Svede to testify concerning these documents after the lunch break. Svede was contacted in his office at work and was told to come to court and to bring any documents he had. When Svede arrived he brought with him a second log of post office accidents that had been in a filing cabinet in his office. During the lunch break on June 4 was the first time petitioner became aware that Svede had kept a separate accident log. App. 71a-73a, 81a-83a.[7]

At the June 4 hearing, Svede informed the district court that he had brought with him his own accident log, which listed the Chilcutt accident (although it contained no other reports of accidents at River Bend). App. 120a. Svede also initially testified that he had seen a copy of Chilcutt's Form 1769, but could not locate it. 6/4/92 Tr. 93. Later during the same hearing, Svede testified that he was unsure whether he had ever seen the form and, in any event, could not now produce it. *Id.* at 100. Iona Smith testified that she never gave Chilcutt any Form 1769 and

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[7] The district court was skeptical of this fact, because Svede had made off-hand references to "my log" during his deposition. Petitioner believed, however, "based upon the answer provided by Al Svede," as stated in the aforementioned June 3 response to the sanctions motion, that there was no log containing a "record of any [accident] complaint of the type sought by Plaintiff's request." R. 436. He also believed that there was only one set of accident logs maintained by the Postal Service Safety Office—the Kunkel logs—and that Svede's statements were merely his references as a postal employee to that set of logs.

that Chilcutt never turned in a Form 1769 to her. *Id.* at 85-86.

After all the testimony was concluded, the court asked petitioner why the Svede logs had not previously been produced. According to the court of appeals, "Mr. Means merely asserted that he did not believe that the log was covered by the requests for production." App. 9a n.14. In fact, the transcript reveals the following initial response: "It is not covered by any document production request or subpoena duces tecum. The search that was conducted—" whereupon the district court interrupted (as shown by the dash) and stated "Okay. You have answered it." 6/4/92 Tr. 105. In addition, after conceding the responsiveness of the log during closing argument, petitioner twice unsuccessfully began to explain why the failure to produce it was not intentional. The first time, he began referring to Svede's deposition, whereupon the court stopped him (as again revealed by a dash in the transcript) and admonished him to "stick within the record," *id.* at 143, of the court hearings, of which the deposition had not been made a part. Petitioner later tried to explain that the document was "not withheld as a result of any trickery or improper motive," soon after which the Court stopped him again (as a dash in the transcript again reveals) and said "Okay. You have run out of time." *Id.* at 144.

At the close of the hearing, the court concluded that sanctions against the United States were warranted. That decision was based on two factors. First, the court stressed the issue of the timing of the government's responses, concluding that the "plaintiffs' ability to prepare for trial has been seriously disrupted because of the time that's had to be devoted by plaintiffs' counsel to matters related to the failure of defendant to timely answer the interrogatories and timely respond to the requests for production." *Id.* at 147. Second, the court concluded that "the government failed to obey" its May 26 order in failing to produce Svede's accident log. *Id.* at 148.

Based on these findings, the court concluded that sanctions under Fed. R. Civ. P. 37(d) were appropriate, and that Fed. R. Civ. P. 37(b) would also support sanctions. Accordingly, the court ordered conclusive findings of "designated facts" that established liability on the part of the United States, leaving only damages issues and affirmative defenses, if any, for resolution at trial.[8] App. 37a-38a. Trial on damages proceeded on June 9. The following day, the district court entered an order awarding damages totalling $892,567 and entered a final judgment.

c. On July 1, roughly 20 days after entry of final judgment, the district court, not yet aware of the existence of the Kunkel logs, entered an order indicating that it was concerned about possible misrepresentations petitioner might have made to the court regarding his knowledge of the existence of the Svede logs. The order indicated that the court was contemplating potential disciplinary actions against petitioner, including criminal contempt proceedings, disbarment, or sanctions under Fed. R. Civ. P. 11. *Id.* at 44a. The court indicated that, in lieu of a formal "show cause" hearing, it would give petitioner an opportunity to address these issues at a "preliminary hearing." *Id.* at 52a.

At this pivotal July 28 hearing, both petitioner, represented by private counsel, and Svede testified that the

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[8] The Department of Justice, on behalf of the United States and petitioner, filed a notice of appeal and sought emergency relief from the court of appeals after the conclusion of the June 4 hearing. This appeal concerned only the individual sanctions against petitioner and was prompted by the concern that execution by petitioner of the affidavit certifying that he had not, and would not, seek reimbursement of the $2500 sanction might preclude later appellate review. The court of appeals denied the relief, ruling that this order was not collaterally appealable. The court indicated, however, that "[e]xecution of the affidavit required . . . would not prevent AUSA Means or the government from challenging this rather harsh sanction order at the appropriate time." Order (5th Cir. filed June 8, 1992).

failure to produce the "Svede logs" had been the result of misunderstandings and not any intent to withhold relevant information. *Id.* at 71a-73a, 81a-82a. As both petitioner and Svede testified, the genesis of the problem was that there were *two* separate sets of logs—the Safety Office log maintained by Kunkel and the "Non-Vehicle Accident Register" maintained by Svede. Although petitioner had made numerous and exhaustive efforts to elicit all relevant information from Postal Service employees, Svede had neglected to mention the log until immediately before the afternoon hearing on June 4 when Svede arrived at the courthouse with the log. *Id.* at 66a-67a, 71a-72a, 81a-82a, 90a-91a. The Safety Office logs maintained by Kunkel contained no entries regarding the River Bend Post Office. *Id.* at 71a, 73a, 82a, 90a. Because, until the afternoon of June 4, petitioner believed the Kunkel logs to be the only logs in existence, he had stated to plaintiffs and to the court that morning that there were no logs responsive to the discovery requests, which were explicitly limited to accidents at the particular post office where Chilcutt was injured.

Svede confirmed that he failed to inform petitioner of the existence of the log. He explained that the log had become "rolled up in the file cabinet," and that he simply forgot about it. *Id.* at 64a. Svede explained that he kept a log of accident reports only as an index for use in locating information about an incident in the course of his duties. Because the Chilcutt file was already known to him, it never crossed his mind to check his logs to see if it was included on his indexes. It did not come "to mind" even when petitioner specifically asked about any logs in his possession until he made a final search in response to the court's order to appear to testify. *Id.* at 80a-81a.

Plaintiffs' counsel argued that Svede's statement in his deposition referring to "my log," and plaintiffs' discovery request, should have alerted petitioner to the existence of a separate Svede log. Petitioner explained, however, that

he understood those references solely in terms of Kunkel's logs. *Id.* at 83a-84a, 87a-88a. That was a reasonable assumption in light of Svede's testimony that Kunkel's logs were the only ones Svede had identified for petitioner. *Id.* at 71a-75a.

The district court stated at the close of the hearing that "Mr. Svede is basically being honest." *Id.* at 114a. Although the district court was openly skeptical that petitioner's actions were inadvertent, it nevertheless expressly held that it would give petitioner the "benefit of the doubt" and *not* pursue proceedings that could lead to criminal contempt charges or disciplinary action. *Id.* at 116a. That conclusion made sense because the personal accounts of petitioner and Svede concerning the events were completely consistent and thus it would be impossible to conclude that Svede was being truthful but petitioner was not.

After the hearing of July 28, the court entered a final order resolving the ethical/contempt charges intimated in the July 1 order. App. 53a-54a. The court stated that "whether the conduct was intentional or grossly negligent, entry of the following order would be appropriate," and ordered petitioner to attend 15 hours of ethics classes and pay plaintiffs' counsel $625 to compensate her for preparing for and attending the July 28 hearing, both at his own, and not government's, expense. *Id.* See also *id.* at 40a, 117a-118a.

Petitioner, in his capacity as the trial attorney, recommended appeal from the judgment against the United States. He also requested that the Department of Justice appeal on his behalf the court's order not to seek reimbursement of the monetary sanctions under 28 C.F.R. § 50.15(c)(1).

2. *Proceedings Before the Court of Appeals.* Both the United States and petitioner appealed from the final judgment and all orders of the district court and both were represented by the Department of Justice. Relying

upon the post-trial July 28 hearing and the express decision of the district court not to pursue a formal show cause hearing, the government argued that the lack of a finding of willful misconduct on the part of petitioner required the reversal of both the sanction against the United States and the injunction against reimbursement imposed upon petitioner. The government argued that, absent willful misconduct by its attorney, the court's decision to prevent reimbursement was an abuse of discretion. It further argued that, under the circumstances, the injunction constituted an unwarranted interference with the Executive Branch's conduct of litigation and its right to insulate its employees from liability incurred in the good faith performance of their duties, in violation of basic separation of powers principles.

The court of appeals affirmed the district court, but on a fundamentally different theory of the case. With respect to the government, the court of appeals ignored the district court's rationale for imposing the sanctions, which was the government's failure to respond timely to plaintiffs' discovery requests, 6/4/92 Tr. 146, 147, and its "fail[ure] to obey th[e] order" compelling discovery. *Id.* at 148. Instead, the court of appeals went beyond the findings of the district court, stating: "Because we conclude that the Government indeed flagrantly and willfully disregarded its discovery obligations and the district court's order, we need not decide what lesser standard of behavior would have justified the type of sanction ordered . . . ." App. 17a n.23.

The court made no effort to conceal the true nature of its undertaking on this issue. In the absence of findings of fact by the district court on this issue, the court of appeals expressly observed that its conclusion was based on "the credible evidence in the record of this case . . . ." *Id.* at 17a. With respect to the injunction against petitioner, the court of appeals similarly ignored the district court's only stated ground for prohibiting re-

imbursement, *viz.*, that taxpayers should not pay for the cost of a motion to compel discovery from the government. Based on its prior finding of willful misconduct with respect to the sanctions against the government, and recharacterizing the district court's orders sanctioning petitioner as designed to "punish Mr. Means for his flagrant disregard of his discovery obligations," the court of appeals held that the sanction imposed upon petitioner by the district court was appropriate.[9] *Id.* at 18a. As for the separation of powers argument, the court of appeals declared that in a case of willful misconduct it would violate separation of powers principles to "restrict a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch." *Id.* at 27a (emphasis omitted).

In response to the panel's opinion, the Department of Justice filed a petition for rehearing (which is reproduced in the appendix to this petition (*id.* at 121a-133a)) on behalf of the United States and petitioner in which it argued that the panel "has seriously misapprehended some of the pivotal facts of this case." *Id.* at 121a-122a. The petition then catalogued the factual errors and explained in detail precisely how the record demonstrably diverged from the panel's conclusions. The petition was denied without comment. *Id.* at 55a.

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[9] There seems little doubt that the court of appeals' perception of the record significantly influenced its decision. Not only was the court increasingly inflammatory throughout its opinion in its characterization of petitioner's conduct, but the court also ordered the government to pay "all costs and attorney's fees" for the appeal to the appellees. App. 29a. The court stated no basis or justification for imposing that order. Such an extraordinary order certainly could not have been justified on the basis of the legal issues actually presented on appeal, as opposed to the misconduct issue decided by that court. *See id.* at 17a-18a. Moreover, 28 U.S.C. § 2412 expressly excludes Federal Tort Claims Act cases from attorney's fees awards even where the Government's position is not "substantially justified."

REASONS FOR GRANTING THE PETITION

This is not an ordinary petition for certiorari. Petitioner is an Assistant United States Attorney whose appeal raised a fairly straightforward legal issue of whether the district court had the authority to bar him from seeking reimbursement, pursuant to Department of Justice policy, of discovery expenses he was ordered to pay pursuant to Fed. R. Civ. P. 37(d). The appeal was authorized by the Solicitor General presumably because the issue is one of some recurring significance and because there is appellate authority for the proposition that courts should not intrude upon the attorney-client relationship by interfering with their arrangements regarding the payment of monetary sanctions. See *Blue* v. *Department of the Army*, 914 F.2d 525, 549 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).[10] The United States also had a perfectly respectable legal argument that, at least absent willful misbehavior, separation of powers concerns should limit a district court's discretion to intrude into the relationship between a government attorney and the Department of Justice. Neither the government nor petitioner could reasonably have anticipated, however, that petitioner's professional reputation would be irreparably harmed by an appellate court making findings of fact that not only were *not* made by the district court, but also partly contradicted the ultimate findings of the district court without any suggestion that the district court's view was clearly errone-

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[10] In *Blue*, the Fourth Circuit disapproved a district court's injunction, coupled with a Rule 11 monetary sanction, barring an attorney employed by the NAACP, which had provided counsel for the plaintiff's case, from seeking reimbursement from the NAACP. Petitioner's case for why the courts ought not to interfere with the attorney-client relationship is, if anything, stronger than was the case in *Blue*. Petitioner is not just an attorney enjoined from seeking reimbursement from his client, but rather is a government employee enjoined from utilizing established procedures for seeking indemnification for liability incurred in the good faith performance of his duties.

ous. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

To be sure, this Court ordinarily does not sit to review errors committed by courts of appeals, and petitioner recognizes that the Court routinely denies certiorari when the only argument is that the decision below conflicts with a decision of this Court. But the problem posed by the court of appeals' decision in this case is of such profound importance both to the individual attorney involved and to United States government attorneys in general, and the court of appeals' departure from established procedural norms was so egregious, that the Court should depart from its usual approach and correct this error summarily.

1. There can be no question that the court of appeals committed a grevious error by assuming the role of fact-finder in this case. It is axiomatic that appellate courts should not make factual findings *de novo*. This Court recognized the principle most recently in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. at 713-14. There, the Court vacated the judgment of the court of appeals with the plain observation that "it should not simply have made factual findings on its own." *Id.* at 714. Indeed, appellate fact finding may well exceed the jurisdiction conferred by 28 U.S.C. § 1291, covering "appeals from all final decisions of the district courts." See also *Singleton* v. *Wulff*, 428 U.S. 106, 119-20 (1976). The district court here entered no "decision" finding that petitioner knew of the Svede log and no conclusion that he willfully concealed evidence, lied, or was contumacious.

Moreover, there are recognized risks inherent in appellate fact-finding. See *United States* v. *Best*, 939 F.2d 425, 431-32 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992). In *Best*, the Seventh Circuit en banc noted that the panel that originally decided the appeal had engaged in unwarranted fact-finding in concluding that an Assistant United States Attorney was guilty of misconduct. That finding was vacated, with the observation by

the en banc court that "we should not perform that [fact-finding] task in [the district court's] stead." *Id.* at 432 n.3. See also *United States* v. *Tarricone*, No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994), (vacating panel's previous prosecutorial misconduct findings and remanding issue to district court). In sum, the proposition is unassailable that a court of appeals exceeds its authority by affirming a judgment based on factual findings not made by the district court.

2. This case was litigated in the court of appeals on the reasonable assumption that it was not a case involving counsel's willful misconduct, because the district court had expressly refused to find willful misconduct on the part of petitioner. Indeed, even plaintiffs' counsel, in interpreting the trial judge's references to "government" withholding of the Svede log, argued that the district court found that "calculated withholding of documents" was undertaken by "Al Svede/Robert Kunkel/Iona Smith." Brief for the Appellees at 7 (5th Cir. filed Jan. 25, 1993). Plaintiffs did not argue that petitioner was involved in any willful misconduct.[11] Thus, even at the reply brief stage in the court

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[11] Appellees below did argue that the sanction against the United States—the conclusive findings establishing liability—was justified by the willful misconduct of the government in general. But that argument was based on the failure of the postal employees to provide information to petitioner so that it could be supplied to the plaintiffs. That issue is not before this Court.

Appellees below also argued that petitioner failed to exercise "diligence" in complying with discovery deadlines. Petitioner does not quarrel with that characterization. He readily admits that he erred badly in failing to attend to discovery deadlines, and at least in not seeking an enlargement of time. For this reason he has not challenged the basic sanction imposed upon him. But he does challenge the reimbursement injunction because it provides him with a concrete injury that allows him to challenge the Fifth Circuit's injury to his reputation. *See Sullivan* v. *Committee on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1967) (appeal of misconduct determination by grievance committee, imposing no sanction due to first-impression nature of case); *Fromson* v. *Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir. 1989) (appeal allowed in civil action where

of appeals, petitioner had no reasonable basis for anticipating that the court of appeals would summarily conclude that he engaged in reprehensible misconduct. This was not the regular procedure to which an attorney accused of misconduct is ordinarily entitled. See *In re Ruffalo*, 390 U.S. 544 (1968).

In addition to being procedurally infirm, the court of appeals' factual findings are not supported by the district court record. The district court failed to make a finding of intentional wrongdoing, and instead gave petitioner "the benefit of the doubt." App. 116a. The district court, unlike the panel below, had imposed the sanction against petitioner on the theory that he had not acted properly in response to his discovery obligations and that taxpayers should not pay for his mistakes. *Id.* at 40a. If the court of appeals had simply affirmed on those grounds, petitioner would disagree, but would not stand accused and summarily convicted of egregious misconduct.

Rather than reviewing the case based upon the factual findings of the district court, however, the court of appeals undertook its own review of what "the credible evidence in the record of this case reveals" and then excoriated petitioner for "intentionally withh[olding] documents" and making "blatant misrepresentations to the district court." *Id.* at 17a-18a. Those factual observations are both incorrect and inflammatory. What is more, the district court—which had the opportunity to view the demeanor of the witnesses and petitioner first-hand—declined to make such findings. Finally, the court of appeals expressly questioned Svede's credibility (App. 19a) in the

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reputation damaged). If this Court corrects the court of appeals' error in engaging in appellate fact-finding, on remand petitioner will have an opportunity to have the propriety of the no-reimbursement injunction decided on the terms that formed the basis for the district court's decision—that the taxpayers should not pay for the mistake of a public servant handling a case load that exceeded 100 cases.

face of the district court's finding that Svede was "basically being honest." *Id.* at 114a. It bears repeating that both Svede and petitioner testified unequivocally that Svede *never* told petitioner that his logs existed—despite repeated inquiries by petitioner whether *all* relevant documents had been located and produced—until the lunch break at the June 4 hearing. The district court expressly credited Svede's testimony, and it is simply impossible to conclude that Svede was *not* lying, but petitioner was.

Treading where the district court declined to go, the court of appeals committed precisely the kind of mistake that justifies the absolute rule against appellate fact-finding. The court of appeals utterly failed to recognize the confusion that existed between the Svede logs and the Kunkel logs—an ironic mistake in light of the fact that the reason the Svede logs were not initially produced was petitioner's original lack of knowledge that there were two sets of logs. The court of appeals stated, for example, that "[d]uring that hearing, Mr. Means again claimed that although Mr. Svede possessed an accident log, it was not covered by the plaintiffs' requests for production." *Id.* at 7a & n.12. The transcript passage that the court quotes, however, was from the hearing in the morning of June 4, where petitioner was describing the Kunkel log—the only log of which he was aware—not the Svede log. See *supra* pp. 7-8.[12]

Similarly, the court made an outright mistake in its description of the content of the Svede log, which perhaps

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[12] To be sure, petitioner failed adequately at the afternoon hearing of June 4 to explain the problem when he initially stated that the log was not responsive, so that the failure to have produced it would have been immaterial. Petitioner's response, however, was in part due to his desire to avoid embarrassment to Svede and to protect his client, the United States, from being sanctioned for Svede's actions. Moreover, as shown above (*supra* pp. 9-10), on three separate occasions during that hearing, petitioner attempted to explain that he had previously been completely unaware of the Svede logs, but the district court cut him off brusquely. 6/4/92 Tr. 140, 143, 144.

explains the court's vehement rhetoric. The court of appeals stated that "the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office," and that "[t]his log apparently contained information about remedial actions taken by the USPS in response to Ms. [Chilcutt's] accident, as well as information on other accidents which occurred at the River Bend location." App. 16a & n.21; *id.* at 5a & n.6. These statements are completely and demonstrably wrong. The Svede log is reproduced in its entirety in the appendix (*id.* at 120a) and even a cursory inspection of the document shows that it contains no other River Bend entries and it says nothing about remedial actions. It is simply inexcusable that the panel refused to acknowledge its error—at the cost of petitioner's professional reputation—when the Department of Justice demonstrated the facts in a respectful and measured petition for rehearing.

Moreover, if the court of appeals had examined the logs, it would have been plain to the court that there was never any intentional misconduct by petitioner (or anyone else). No rational person would risk serious sanction by withholding this document—especially in view of the district court's obvious pique at the shortcomings in the government's discovery performance in the case—while at the same time disclosing hundreds of other documents that were at least as relevant and presumably more damaging to the government's case. This is not a case where a "smoking gun" document has been concealed.[13]

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[13] The court of appeals also found that "the same contractor cleaned all of the post offices in the Fort Worth area . . ." (App. 4a n.5) which, if true, might make the Svede log marginally more important. But as the petition for rehearing filed by the United States in the court of appeals makes plain, "the district court made no such finding, and indeed there is no evidence in the record that would bear out such a finding." *Id.* at 125a. The government also pointed out that the cleaning contractor worked at none of the other sites mentioned in the Svede log. *Id.* at 125a-26a. Again, the panel simply chose not to correct its manifest factual error.

This is a case where an innocuous document was not disclosed in timely fashion. The lack of timely production may justify a sanction under Fed. R. Civ. P. 37(d), but it does not justify interfering with a government lawyer's right, pursuant to Department of Justice policy, to seek reimbursement of the sanction, and it certainly does not justify pillorying an Assistant United States Attorney with an otherwise unblemished professional record.

Finally, the court of appeals went awry in relying upon the nonproduction of the supposed Form 1769 as a further instance of misconduct. *Id.* at 9a & n.13. As noted above, the testimony presented on the issue whether such a form existed was directly in conflict, and the district court not only declined to make express findings on this point, but also did not even mention it in its discussion as to why sanctions were appropriate.

The court of appeals addressed this factual issue entirely on its own, and rested its conclusion exclusively on one portion of Mr. Svede's testimony. Characterizing the government's argument, even on appeal, that the form did not exist as "quixotic," the court nonetheless felt free completely to ignore the testimony of the responsible federal employee, Iona Smith, that no such form was created, and it ignored Svede's own subsequent statements that cast doubt on his initial recollection. Unquestionably, a district court that observed the testimony of Svede and Smith might be in a position to reach that conclusion, but a court of appeals plainly is not entitled to resolve that issue based upon credibility judgments made on a limited portion of the cold paper record. *Id.* at 17a. This was manifestly improper. Moreover, even if Smith were mistaken and even if Svede did at one time see a Form 1769 filled out by Chilcutt, there is *no* evidence in the record even hinting that petitioner had any knowledge of the existence of such a form. The court of appeals nonetheless blithely stated that "Mr. Means presented *no* explanation for his misrepresentation" regarding Form 1769. *Id.* at 9a n.13.

3. The court of appeals committed a profound error in substituting its own fact-finding for that of the district court. That decision cannot be squared with *Icicle Seafoods* or with *United States* v. *Best*. But petitioner recognizes that this is not the kind of a case that traditionally warrants plenary review by this Court. Certainly the error in this case is not the type that this Court grants certiorari to hear and decide on a plenary basis. Rather, the decision below embodies the kind of error that is so manifest that it should be corrected summarily. Given the immediate and dramatic effect of this error on petitioner and its far-reaching effects on government attorneys, the error below deserves correction. Because this Court is the only forum in which that error can be corrected, the Court should grant the petition, summarily vacate the judgment and remand for further proceedings.[14]

With respect to the immediate injury, the harm to petitioner's reputation if the court of appeals' opinion stands as the final word is inestimable and irreparable. As one court of appeals observed, "published opinions chastising [counsel] by name" constitute a "serious sanction."[15]

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[14] By substituting new facts for the reasoning of the district court, the court of appeals avoided deciding the difficult issue whether it is an abuse of discretion for a district court to interfere with the Executive Branch's litigation decisions, at least absent willful misconduct by the government's attorney. On remand, the court of appeals would be free to uphold the sanction on the theory advanced by the district court that taxpayers should not pay for government lawyer mistakes. Of course, it could reverse the district court's holding as well. Alternatively, the court of appeals could remand to the district court to clarify whether that court would make a finding of willful misconduct to uphold the injunction against reimbursement on that basis. If the former, then petitioner's professional reputation will have been restored; if the latter, then petitioner will have an opportunity to prove before a trier of fact that his error was not intentional. *See infra* p. 24.

[15] This is not to endorse that approach to sanctioning counsel. To the contrary, beyond monetary sanctions for procedural violations, attorney discipline is best conducted under procedural safeguards established for that purpose.

United States v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). Petitioner stands convicted of a flagrant violation of his professional responsibilities, but has never been given any meaningful opportunity to present his side of the story—apart from the July 28 hearing, after which the district court entered an order disposing of the matter while expressly declining to resolve the question of intentional misconduct. App. 53a-54a. This is because the court of appeals committed its factual errors based on its own evaluation of the record, which was different from the evaluation of the district court, of the government as appellant, and even of the appellees. No one had found or argued that petitioner acted willfully. For the court of appeals to make such a finding and to vilify petitioner under these circumstances is fundamentally unfair.

It is this process that provides the compelling reason why this Court must act. Appellate fact-finding deprives the injured litigant of the opportunity to have an appeal as of right, which otherwise is guaranteed by 28 U.S.C. § 1292. If the appellate court (as the panel did here) finds its own facts to support the judgment of the district court, then the district court proceeding is rendered superfluous. The decision of the court below is fundamentally at odds with this Court's analysis in *Sacher* v. *United States*, 343 U.S. 1, 12-13 (1952), that "[t]he profession knows that no lawyer is at the mercy of a single federal trial judge . . . before punishment takes effect he may have an appeal on law *and fact*." (Emphasis added.) Only review by this Court can vindicate this bedrock principle that a lawyer "at the mercy of a single" court is entitled to one level of meaningful appellate review.

4. Finally, although petitioner's situation is compelling, the need for the Court's intervention in this case should not be measured solely in terms of his plight. The impact of the decision below on federal government attorneys has been widespread and profound. More than 450

government attorneys from all across the United States contacted the Attorney General—not at petitioner's behest—to urge the Department of Justice to support petitioner's efforts to have this decision overturned. Their concern reflects their belief that an attorney's professional reputation is his or her lifeblood, and that a government attorney should be protected from the kind of appellate fact-finding engaged in by the court of appeals here.[16]

More fundamentally, the decision of the court of appeals will distort the appeals recommendation process for the federal government. That process assumes that fact-finding will be done exclusively by the district court and thus provides the government with a clear frame of reference for resolving the often difficult decision whether to seek appellate review of an adverse decision.

This case reveals plainly how that process will be distorted by appellate fact-finding in any situation where there has been a charge of attorney misconduct that the district court seriously entertains—even if it does not conclude that misconduct occurred and a sanction is warranted. The district court's decision to enjoin petitioner from seeking reimbursement from the United States rested

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[16] Government lawyers justifiably feel somewhat beleaguered by recent instances of appellate fact-finding. The *Best* case and the *Tarricone* decision are good examples of appellate courts reaching out to take gratuitous swipes at government counsel's conduct. *See also United States* v. *Ofshe*, 817 F.2d 1508, 1516 n.6 (11th Cir.) (gratuitously labeling the prosecutor's conduct "reprehensible" without any similar finding by the district court), *cert. denied*, 484 U.S. 963 (1987). Fortunately, the first two actions were corrected by the lower courts on rehearing, but not without first creating a stir among government lawyers generally. In this case, the Fifth Circuit has declined to correct its error—despite the petition for rehearing demonstrating those errors—placing the burden of protecting the professional reputation of government lawyers on this Court. The court of appeals' improper conduct has generated widespread interest among government lawyers and lawyers in general, and we understand that a number of *amicus* briefs will be filed in support of this petition.

solely on the desire to insulate federal taxpayers from assuming the costs of petitioner's lack of diligence. That ruling, as well as the ruling ordering sanctions against the United States due to the government's failure timely and fully to comply with its discovery obligations, presented clean legal issues that petitioner recommended should be appealed and that the Solicitor General concluded were suitable for appeal. In any case in which sanctions are an issue, however, the dynamics of that process will inevitably be affected by the court of appeals' decision in this case.

If government attorneys must henceforth consider that their reputations may be jeopardized by appellate fact-finding in the context of reviewing a separate legal issue, neither the interests of the United States, its lawyers, nor the legal system generally, will be served. On the contrary, the risk of appellate fact-finding squarely threatens to present a conflict of interest between the lawyer's duty to represent his client and his basic interest in self preservation. The United States certainly will not be well-served by having its agents' decisions be influenced by such intensely personal considerations. It will be impossible for the United States, through the Solicitor General, to weigh the costs and benefits of appeal in any case in which charges of attorney misconduct are involved if the government cannot proceed on the assumption that the factual record is settled.[17] And as this Court has recognized, it is in the interest of the federal courts for the government's appeals recommendation process to function effectively without being unduly distorted by considerations extraneous to the traditional factors that go into determining whether the government should appeal a case.

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[17] We recognize, of course, that the factual findings of a district court are subject to appellate review on a clearly erroneous standard. *See* Fed. R. Civ. P. 52(a). That circumscribed review, however, is a far cry from what occurred here, where nobody at any point has suggested that the district court's factual findings, or lack thereof, were clearly erroneous.

See *United States* v. *Mendoza*, 464 U.S. 154, 160-61 (1984).

Petitioner readily admits he made mistakes and he regrets them. But he is not the villain described by the court of appeals and the findings necessary to make him that villain were the product of a deeply flawed process that this Court has condemned. There is no basis in either the law or the record for the appellate fact-finding undertaken by the court of appeals in this case. That error may not warrant plenary review by this Court, but it most certainly warrants review and correction both for petitioner and for the hundreds of government attorneys who know that "there but for the grace of God, go I."

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

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April 21, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1668

BRENDA CHILCUTT, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

RANDELL P. MEANS, in his individual capacity,
Appellant,

Appeal from the United States District Court
for the Northern District of Texas

Oct. 25, 1993

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

JOHNSON, Circuit Judge:

When the defendant, United States of America, failed to properly respond to the plaintiffs' discovery requests in the case *sub judice*, the district court ordered the Government to produce previously requested documents and respond to unanswered interrogatories. The court also ordered the Assistant United States Attorney ("AUSA"), Mr. Randell Means, to personally reimburse the plaintiffs

for attorney's fees which arose from the Government's discovery abuse. When the Government disobeyed the district court's order to fulfill its discovery obligations and attempted to deceive the court and the plaintiffs into believing that certain documents properly requested either did not exist or were not requested, the district court, exercising authority granted in Rule 37 of the Federal Rules of Civil Procedure, deemed that the liability facts of the plaintiffs' case were established for the purposes of the case. The Government and Mr. Means aver that the district court abused its discretion in sanctioning them. We disagree and therefore affirm.

I. Facts and Procedural History

On October 4, 1988, Brenda Chilcutt Wortham,[1] performing her duties as an employee of Chrysler First, Inc., visited the River Bend Post Office in Fort Worth, Texas, to pick up the company's mail. Soon after she entered the post office, she slipped and fell. The fall resulted in serious injuries which required Ms. Wortham to undergo several major surgeries and extensive medical care. Ms. Wortham's workers' compensation carrier, Home Indemnity Company ("HIC"), alleged that governmental negligence had caused Ms. Wortham's fall. HIC therefore filed an administrative claim with the United States Postal Service ("USPS") in August 1990, seeking reimbursement for monies paid Ms. Wortham for her work-related injury. Ms. Wortham filed a similar claim in October of the same year. The USPS denied both claims.

Ms. Wortham and HIC later commenced this action in the Northern District of Texas, suing under the Federal Torts Claims Act. In its initial scheduling order, filed on July 17, 1991, the district court stated that "[s]hould any party or counsel fail to cooperate in doing anything

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[1] The plaintiff married after the initiation of this action. The Court will therefore use her present name—Brenda Wortham—in this opinion.

required by this order to be done, such party or counsel or both will be subject to sanctions, including dismissal or entry of default without further notice." R. at 26. In the court's memorandum attached to the scheduling order, entitled "Special Pretrial Instructions," the court informed the parties that it expected counsel for each party to cooperate fully in the discovery process. The court further warned that it would not tolerate discovery abuses, stating that "[u]nnecessary discovery or unreasonable delay may subject the infracting party to sanctions and the payment of costs." R. at 28. The court admonished the parties in the same manner in revised scheduling orders which were filed on February 27, 1992, and March 9, 1992.[2]

On March 24, 1992, Ms. Wortham served interrogatories and requests for production of documents and things on Randell Means, the AUSA in charge of the case.[3] In early April, she reiterated her request for many of the documents and things in subpoenas duces tecum. Although the Government produced some of the requested items for depositions, it did not answer or object to the requests for production or the interrogatories. Counsel for Ms. Wortham, Ms. Kelly Robbins, talked with Mr. Means several times by telephone and in person, both before and after the answers were due. She informed him that time was of the essence and reminded him that the discovery cut-off date was May 8. During each discussion, Mr. Means informed Ms. Robbins that he was preparing responses to the discovery requests and assured her that the answers were forthcoming. In reality, the answers were not forthcoming; Ms. Robbins' efforts to extract answers from Mr. Means were of no avail.

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[2] In the latter scheduling order, the court extended the discovery cut-off date to May 8, 1992, and scheduled the trial for the week of June 8, 1992.

[3] The Federal Rules of Civil Procedure required that the Government respond no later than April 23, 1992. FED.R.CIV.P. 33(a) and 34(b).

On May 19, 1992, twenty-six days after the Government's discovery answers were due, Ms. Robbins filed a motion to compel and a motion for sanctions. The district court scheduled a hearing on those motions for May 22. Mr. Means served Ms. Robbins with answers to some of the interrogatories and objected to others the morning of the hearing. However, at the hearing Ms. Robbins complained, not only about the tardiness of the recently-supplied answers and objections, but she also asserted that a number of the answers to the interrogatories were incomplete.[4] Further, although Mr. Means provided some important documents in response to the requests for production on the morning prior to the hearing,[5] he failed to produce other requested documents. In his answers to the production requests and again at the hearing, Mr. Means averred that at least half of the requested documents did not exist. One such document was an accident log which the plaintiffs claimed Mr. Svede, the Fort Worth USPS accident investigator and the Government's representative for this action, main-

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[4] The Government answered a number of the interrogatories by stating that it did not possess the information requested. For example, Mr. Means testified at the hearing that the janitorial contractor, Ms. Marilyn Chapman, knew the answers to four of the interrogatories. However, Mr. Means had never attempted to contact Ms. Chapman prior to the hearing to get the information. In fact, although Means possessed Ms. Chapman's address, he had never looked up her telephone number in the directory to call her. Further, although Ms. Chapman, who was not a hostile witness to the Government, worked at the post-office each day, Mr. Means had never visited the post office during her work hours to question her.

[5] The documents showed that other people had fallen at other post office locations. Because the same contractor cleaned all of the post offices in the Fort Worth area and used the same type of wax on all of the floors, this information was quite beneficial to the plaintiffs, who claimed, among other things, that the post office floor was excessively slick.

tained.[6] Another was a standard accident report ("Form 1769").

The district court, reviewing these and other discovery infractions, refused to grant the plaintiffs a default judgment. He determined that such a penalty was too harsh under the circumstances before him.[7] Nonetheless, finding that the Government's conduct was not substantially justified and that no circumstances existed which made sanctions inappropriate, the court concluded that a lesser sanction was, indeed, appropriate. The court first ordered the Government to deliver every document called for by the plaintiffs' requests for production to Ms. Robbins' office by May 27. The court directed Mr. Means to attach an affidavit to his responses to the discovery requests certifying that he, Mr. Means, had made inquiries which were calculated to disclose the existence of any document or tangible thing for which the production requests or subpoenas duces tecum called.[8] Additionally,

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[6] This log apparently contained information about remedial actions taken by the USPS in response to Ms. Wortham's accident, as well as information on other accidents which occurred at the River Bend location.

[7] However, he added that he would not rule "out the possibility of there being a default judgment on liability, and perhaps even on damages, if the government continue[d] the course of conduct" in which it had been engaging. Tr. Vol. 3 at 37.

[8] In his response to the requests for production, Mr. Means listed the name of each person he had contacted to assist in his search for pertinent documents. As required by the court, Mr. Means also attached an affidavit to the response, certifying the following:

> Every item responsive to plaintiff's discovery requests has been produced and is listed in this affidavit. I do further certify that I have made inquiries of such a nature as to be calculated to disclose the existence of any item of any kind or character called for by any of plaintiff's discovery requests. I do further certify that the person listed with each enumerated response after the title *"Contact:"* constitutes the persons contacted by me with regard to ascertaining the existence of and locating

the court ordered the Government to produce Ms. Chapman for a deposition on May 28 since the Government had failed to question her. Further, based upon the authority provided under Rule 37(d), the court ordered Mr. Means to pay for those deposition costs and all of the attorney's fees and other expenses the plaintiffs had incurred in preparing the motion to compel and the motion for sanctions. The court stated that these sanctions were against the attorney, not against the United States, and forbade Mr. Means from seeking reimbursement from the Government.[9] The court also informed Ms. Robbins that after she reviewed the Government's recently provided responses to her discovery requests, she could file supplemental motions to compel and for sanctions if she so needed.

She did so. Among other things, she complained in her supplemental motions of the Government's failure to produce the Form 1769 and Mr. Svede's accident log. With respect to the latter, Ms. Robbins specifically pointed out that "Al Svede testified in his deposition (at page 114, line 16) that he keeps a log which, among other things, would contain information relating to types of claims and their disposition. Defendant has never produced this log." R. at 239.

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items responsive to plaintiffs' requests. I do further certify that the response there indicated represents the substance of the response of each such person to the inquiries made by me.

I do hereby declare under penalty of perjury that the foregoing is true and correct.

R. at 181. As to the requests which called for Mr. Svede's accident log, Mr. Means stated in his response that Mr. Svede had been his contact person.

[9] The Government filed an interlocutory appeal, asking this Court to review the district court's decision to sanction Mr. Means. However, because that court had not yet entered final judgment, we dismissed for lack of appellate jurisdiction.

Mr. Means responded to a large number, but not all, of Ms. Robbins' allegations.[10] Important for our purposes, Mr. Means stated that he had produced the only accident log that was responsive to the plaintiffs' production requests.[11] The hearing on this supplemental motion for sanctions occurred on Thursday, June 4, 1992, just four days—only one working day—prior to the scheduled trial. During that hearing, Mr. Means again claimed that although Mr. Svede possessed an accident log, it was not covered by the plaintiffs' requests for production.[12] Mr. Means again testified that no Form 1769 ex-

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[10] He stated that on May 29 he learned that he had previously provided incorrect information on the supplier of the floor wax. Mr. Means also asserted that he had "discovered" the existence of some documents which he had previously claimed were nonexistent.

[11] More specifically, Mr. Means constated:

> *Plaintiff further complains that Al Svede has not produced his own log* relating to the same topic. *Defendant has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's request.* There being no information of the type sought, as established by a *complete search* of the proper records of Defendant and the certified answer of Defendant, there is no violation of this Court's orders shown.

R. at 346. (Emphasis added).

[12] In their requests for production, the plaintiffs limited all inquiries to the River Bend Post Office location. At this June 4 hearing, Means stated that he had checked the log in question. He asserted, however, that the log contained no information on accidents which occurred at the River Bend location. The following transpired:

> THE COURT: Well, why haven't those accident logs been produced?
>
> MR. MEANS: Your Honor, as our motion sets out, the request related specifically to anything that dealt with these premises. A search has been conducted of those accident logs, as we have set out in our response to this supplemental motion,

isted, claiming, "As I understand, the plaintiff says she filled that out and gave it to the witness on that date. Our position is that did not happen." Tr. Vol. 5 at 57.

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and there is no record in those logs relating to any accident or complaint on the premises of River Bend for the time—

THE COURT: Well, that takes care of it. That's what she has asked for.

And if you can at some point in time prove they misrepresented to you in saying that there is nothing, then they have got a different problem. But so far the representation is that there is nothing.

MS. ROBBINS: Well, Your Honor, we do know of two accidents that occurred at that premises, and they would be listed in that log.

THE COURT: Well, I have got to assume they don't do a very good job of keeping their records because *it's been represented that there is no record of those accidents. Is that what you are representing?*

MR. MEANS: *That is correct, Your Honor.*

THE COURT: Even though there are two other accidents on the premises, the post office department did not keep a record in any of its logs, accident logs or other books, of those accidents.

MR. MEANS: There is one accident that was reported. That is the Chillcut (sic) accident this case is based on. And my representation is the same as what is reflected here. *Yes, Your Honor, there is no record of that in this log.* She refers to a second accident that occurred, and no further reporting was made. And the document that was filled out at the scene of the River Bend post office and has remained at that location has been produced, and *there is no other notation in the log of that transaction.*

* * * *

MR. MEANS: There is no record. As our response to this supplemental motion states, *I am stating under oath before the court as an officer of the court that my representations in that motion are correct, that a search of that log has been conducted, and no accident has been identified to the time periods in that log—and I believe it's 1987 through the present—for the premises, River Band [post office], for both employee accidents or complaints or customer accidents.*

Tr. Vol. 5 at 48-50 (emphasis added).

Due to the numerous discrepancies between the plaintiffs' claims and the defendant's response, the court directed the Government to bring its witnesses, including Mr. Svede, to the court later on the same day. One of the first questions the court asked Mr. Svede concerned the existence of the Form 1769. Mr. Svede testified under oath that not only did the Form 1769 exist, *but that he possessed a copy of that form.*[13] If that were not bad enough for the Government, when Ms. Robbins asked Mr. Svede whether he had listed Ms. Wortham's accident in his accident log, he answered that he had done so. Mr. Svede presented the log to the court to review, and it did, indeed, list Ms. Wortham's accident, contrary to Mr. Means' earlier statement that it did not.[14]

The court disagreed, finding that several of the requests covered the accident log. The court further found that although the Government and the people working on the case knew that the log existed and that it was called for by the requests for production, the Government chose to withhold the documents in derogation of the discovery rules and the court's order compelling discovery. Finally, the court found that the Government had severely disadvantaged the plaintiffs by producing the documents on the eve of trial and by causing the plaintiffs' counsel to devote a great amount of time, not to preparing for trial, but to dealing with the Government's discovery abuses.

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[13] Mr. Means presented *no* explanation for his misrepresentation regarding Form 1769. In fact, even though Mr. Svede, *the Government's representative,* testified under oath that such a form existed and that he possessed a copy thereof, Mr. Means and the Government—similar to the argument that windmills are dragons—persist in their quixotic claim that the form does not exist. Tr. Vol. 5 at 142; Oral Argument Tape.

[14] *See infra* note 12. Mr. Svede provided no explanation as to the non-production of the log. Mr. Means merely asserted that he did not believe that the log was covered by the requests for production.

Exercising authority under Rules 37(b) and 37(d) of the Rules of Civil Procedure, the court determined that stiff sanctions were appropriate because of the Government's flagrant disregard of its discovery obligations and its flouting the court's order compelling discovery. Although the court believed that a default judgment as to liability or damages was justified, it decided instead merely to deem that the *prima facie* elements of the plaintiffs' liability claim were established for the purposes of the case. The court allowed the Government to present evidence of its affirmative defenses and required the plaintiffs to prove damages. After a bench trial on the Government's affirmative defenses and on damages, the court found for the plaintiffs and awarded them $892,567.00.

Not prone to overlook what appeared to be a "flagrant case of misrepresentation by Mr. Means, as well as a rather flagrant violation of the discovery obligations," the district court held a hearing to determine whether it should hold Mr. Means in criminal contempt of court and bar him from practicing before the Northern District of Texas. Tr. Vol. 3 at 4. During the hearing, the court ignored many of the discovery infractions and focussed solely on Mr. Svede's log. Despite the fact that he had previously referred to the accident log several times, both in his response to Ms. Wortham's supplemental motion for sanctions [15] and in a hearing before the court in which he had affirmed, as an officer of the court, that he had reviewed that particular log,[16] Mr. Means claimed at ***this*** hearing that he had never ***seen*** the log and had not known that it existed prior to the June 4 hearing.

The district court thought otherwise, concluding that he could find that the elements of criminal contempt were proved beyond a reasonable doubt. The court determined that Mr. Means had intentionally misrepresented to the court that Mr. Svede's log did not report Ms. Wortham's

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[15] *See supra* note 11.

[16] *See supra* note 12; *see also supra* note 8.

accident. However, giving Mr. Means the "benefit of the doubt," the court chose not to disbar him or hold him in criminal contempt. Instead, the court ordered Mr. Means to obtain fifteen hours of ethics or professional responsibility training by November 1, 1992. He also dictated that Means not be reimbursed for the training costs and ordered Mr. Means to reimburse Ms. Robbins for the time she had spent in the hearing. The Court again directed that Mr. Means not seek or obtain reimbursement for that sanction.

The Government and Mr. Means are not satisfied in the least bit with the outcome of this case, and they both appeal. The Government argues that the district court abused its discretion in deeming the liability elements of the case established. Mr. Means challenges the court's decision forbidding him from seeking reimbursement from the Government.

II. Discussion

A. *Standard of Review*

Rule 37(b)(2) authorizes courts to appropriately respond to and deal with parties which have disobeyed discovery orders. District courts' discretion in fashioning appropriate sanctions for parties who disobey their orders is quite broad, though not unlimited. *Marshall v. Segona,* 621 F.2d 763, 767 (5th Cir.1980); *Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379, 1381 (5th Cir.1976). Hence, the question we must decide in each of these issues is not whether this Court would have imposed the same sanctions as did the district court; the question is whether the district court abused its discretion in so doing. *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 640, 96 S.Ct. 2778, 2778, 49 L.Ed.2d 747 (1976); *Shipes v. Trinity Indus.,* 987 F.2d 311, 323 (5th Cir.1993).

B. *Establishing Facts Against the Government*

1. Proper Standard

The Government, in its argument that the district court improperly sanctioned it, insists that the sanction in question was tantamount to a default judgment on both liability and damage claims. The Government therefore contends that Rule 37 dismissal and default judgment cases control the facts of this case. *See e.g. Batson v. Neal Spelce Associates, Inc.* 765 F.2d 511 (5th Cir.1985); *Marshall v. Segona,* 621 F.2d 763 (5th Cir.1980); *Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379 (5th Cir. 1976). While it is true that a court's decision to deem certain facts established may equate to a default judgment in some circumstances, *see Marshall,* 621 F.2d at 766 n. 3, such is not the case here.[17]

The district court allowed the Government to present its case in chief on its affirmative defense issue. The Government did so: it called three witnesses to attempt to prove that Brenda Wortham's negligence, not that of the Government, had caused the accident. Because the court's ruling did not preclude the Government from presenting its case in chief, the sanction was a far cry from a default judgment.[18] Further, the Government's assertion that the court also granted a default judgment on the damages issues is all but fanciful. Not only did the court require Ms. Wortham to prove damages, but on many of the

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[17] We note that deeming the establishment of certain facts is one of the least harsh sanctions available to courts under Rule 37(b). Indeed, it is only more severe than the granting of expenses and attorneys' fees. *See* FED.R.CIV.P. 37(b)(2); *see also United States v. Sumitomo Marine and Fire Ins. Co.,* 617 F.2d 1365, 1369 (9th Cir.1980).

[18] Clearly, had the Government proved its case by a preponderance of the evidence, the fact that the liability elements had been deemed established would have been nugatory, and the Government would have been victorious in this litigation.

damage elements, the court made conclusions which were very favorable to the Government.

Thus, we believe that the default-judgment/dismissal cases proffered by the Government impose too great a standard for the type of sanction involved here. Rather than look to those types of cases, we believe that the Supreme Court's decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), governs this case.

There, the Compagnie Des Bauxites de Guinee ("CBG") filed suit in a Pennsylvania district court against its insurance companies. Several of the companies ("excess insurers"), including the Insurance Corporation of Ireland, filed motions for summary judgment based upon their contention that the Pennsylvania court lacked personal jurisdiction over them. CBG sought discovery on the personal jurisdiction issue; however, the excess insurers, though ordered and later threatened with sanctions, failed to make a conscientious effort to comply with the discovery orders. The district court therefore carried through on its threatened sanctions and determined that the excess insurers were subject to the in personam jurisdiction of the court for the purposes of the litigation. *Insurance Corp. of Ireland*, 456 U.S. at 697, 102 S.Ct. at 2101.

The Supreme Court, affirming the ruling of the district court, determined that decisions to impose sanctions under Rule 37(b) must be guided by two important considerations: The sanction must first of all be just, and it must "specifically relate[] to the particular 'claim' which was at issue in the order to provide discovery." *Id.* at 707, 102 S.Ct. at 2107. The Court found several significant facts which contributed to its decision that the sanction was fair. First, the district court had warned the excess insurers on several occasions that continued delay and disregard of its orders would result in the imposi-

tion of sanctions. The Court also found that the excess insurers' repeated promises to comply with discovery orders was supportive of the district court's decision. Finally, the Court concluded that the allegation of personal jurisdiction was not frivolous and that CBG's attempt to use discovery to prove that personal jurisdiction existed was not a misuse of the judicial process. *Id.* at 707-708, 102 S.Ct. at 2106-2107.

Because the discovery in issue targeted personal-jurisdiction evidence, the Court had no problem in finding that the deemed finding—personal jurisdiction—was sufficiently related to the claim sought to be proved by discovery. *Id.* at 708-709, 102 S.Ct. at 2107. The Court therefore found that the district court did not abuse its discretion in sanctioning the excess insurers. *Id.*

We believe that the two standards presented in *Insurance Corp. of Ireland*—fairness and substantial relationship between the sanction and the claim—along with a third—that the sanction meet the Rule 37 goals of punishing the party which has obstructed discovery and deterring others who would otherwise be inclined to pursue similar behavior, *National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781—should guide our review of the district court's decision in the case *sub judice.*

2. Just and Fair?

a. Ample Warning

This case resembles *Insurance Corp. of Ireland* in several key respects. First, as occurred in that case, the district court here warned the parties many times that it would not tolerate discovery abuses. *See Bluitt v. ARCO Chemical Co.,* 777 F.2d 188, 191 (5th Cir.1985) (affirming the dismissal of a case where the district court found that the plaintiff's failure to obey discovery orders and heed warnings that dismissal would occur unless the plaintiff performed its discovery obligations showed that

a sanction lesser than dismissal would have been of no avail).

In the instant case, the parties were warned in each of three scheduling orders, as well as in each of the memoranda which accompanied those orders, that discovery violations could result in dismissal or default judgment. Further, in the first hearing on Ms. Wortham's motion to compel, the district court, declining to grant a default judgment, specifically explicated that default judgment on liability and perhaps on damages might be justified if the Government continued in the type of conduct in which it was engaging.[19] Further, during the hearing on the second motion to compel, the district court warned that if the plaintiffs could prove that the Government had falsely stated that the log contained no information on accidents which occurred at the River Bend location, the Government would have a problem.[20]

Having been warned numerous times that discovery abuses in general and that the continuation of its conduct in particular might result in a default judgment, the Government should not have been surprised by the district court's decision to deem the liability facts established. In fact, based upon the Government's flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court, the Government should have been relieved that the court did not order a much stiffer penalty.

b. Empty Promises

This case is also similar to *Insurance Corp. of Ireland* in that the Government here, like the excess insurers there, repeatedly promised to comply with its discovery obligations. Ms. Robbins, the plaintiff's counsel, testified

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[19] *See supra* note 7.

[20] *See supra* note 12.

that she communicated with Mr. Means numerous times, both face to face and by telephone, before and after the Government's answers were due, explaining to him that time was of the essence and reminding him of the discovery cut-off date. Even according to Mr. Means, each time he and Ms. Robbins talked, he promised that the answers would be forthcoming.

Without a doubt, those promises strung Ms. Robbins along, causing her to incorrectly believe that seeking an order compelling discovery or moving for Rule 37 sanctions was unnecessary. Ms. Robbins believed the Government's promises until it was nearly too late for her to adequately prepare her case. Had the Government simply refused to perform its discovery obligations without giving vain assurances of its alleged intent to comply, Ms. Robbins would almost certainly have sought an order to compel much earlier than she did. We view the Government's unfulfilled promises as the Supreme Court viewed the excess insurers' pledges to comply with CBG's discovery requests: They support the district court's decision to impose sanctions.

c. Frivolity of the Claim

The Government has never contended that the plaintiffs' use of discovery was an abuse of judicial process. The plaintiffs had a colorable claim that the Government's negligence caused Ms. Wortham's accident. The Government conceded that only five of eight light fixtures were functioning on the day of the accident. More importantly, the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office.[21] The plaintiffs' claim of liability was far from frivolous.

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[21] The district court stated that the only reason the Government would withhold Mr. Svede's accident log and then make misrepresentations as to the log's contents was to prevent the plaintiffs from learning that a number of other customers had also fallen at the River Bend location.

d. Other Considerations

1. Intentional Misconduct

The Government asserts that there is no evidence of willful or contumacious behavior in this case. It therefore claims that the district court's sanction was unjust.[22] We disagree. As discussed earlier, the sanction granted here was not tantamount to a default judgment, and this Court has never held that willful or contumacious conduct is a prerequisite to sanctions which are less harsh than a dismissal or default judgment.

Regardless of the proper *mens rea* standard however,[23] the credible evidence in the record of this case reveals

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[22] This Court, and the Supreme Court, as well, have often forbidden the dismissal of a case if the conduct involved was not willful or contumacious. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255 (1958); *Bluitt v. Arco Chemical Co.*, 777 F.2d at 190-91; *Batson*, 765 F.2d at 514.

[23] Because we conclude that the Government indeed flagrantly and willfully disregarded its discovery obligations and the district court's order, we need not determine what lesser standard of behavior would have justified the type of sanction ordered in this case.

We note, however, that Rule 37(b) clearly indicates that district courts have authority to grant a broad spectrum of sanctions. Of course, the flagrancy of a party's behavior must be directly proportionate to the severity of the sanction imposed. Nonetheless, neither this Court nor the Supreme Court has ever determined that the lack of willful, contumacious, or prolonged misconduct prohibits all sanctions. On the contrary, we have held that dismissal or default judgment is *warranted* only when misconduct is quite serious.

The Supreme Court made clear in *Rogers*, a case in which the petitioners were absolutely precluded by foreign law from turning over certain documents to the respondents, that though the petitioners were *unable* to comply with the discovery requests, the district court still had broad discretion to mete out a lesser sanction than dismissal. *Rogers*, 357 U.S. at 213, 78 S.Ct. at 1096 (stating that "[i]t may be that in the absence of complete disclosure by

quite readily that the Government not only intentionally withheld documents that it knew existed, but it also knowingly made blatant misrepresentations to the district court about the existence of those documents.[24] Such conduct, in our view is patently willful and contumacious. Indeed, the district court considered Mr. Means' behavior to be *so* willful and contumacious that it seriously considered disbarring Mr. Means and holding him in criminal contempt. The punishment meted out here clearly fit the conduct involved.

2. It's Not Our Fault

The Government further claims that it was an innocent client and that the district court unfairly punished it for the errors of its attorney, Mr. Means. This Court has often emphasized that an innocent party should not be severely penalized for the misconduct of its counsel. *Batson*, 765 F.2d at 514; *Marshall*, 621 F.2d at 768; *Factory Air Conditioning Corp. v. Westside Toyota, Inc.*, 579 F.2d 334, 337 (5th Cir.1978). However, the district court did not punish the Government for misconduct solely attributable to the Government's attorney. The court concluded that there was "no question but [t]hat

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petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events").

Significantly, the Court explained that the type of conduct displayed by a party had no bearing on *whether* sanctions should be imposed, but only on the *type* of sanctions imposed. The Supreme Court explained, "[T]he willfulness or good faith of [a party], can hardly affect the fact of noncompliance and [is] relevant *only* to the path which the District Court might follow in dealing with [the party's] failure to comply." *Id.* at 208, 78 S.Ct. at 1094 (emphasis added). Hence, we simply note that willfulness is not required for deeming that certain facts are established for the purposes of a case unless that sanction is the equivalent of a dismissal or default judgment.

[24] This Court has noted, but chooses not to write on, numerous other discovery violations committed by the Government, as reflected in the record of this case.

[the accident log] was called for by the requests for production and was obviously known *to people that were working on the case on behalf of defendant.*" Tr. Vol. 5 at 148. The key people who worked on the case were Mr. Means, the Government's attorney, and Mr. Svede, the Government's representative.

There is ample evidence in the record to support the district court's conclusion that Mr. Svede also engaged in misconduct. During Mr. Svede's deposition, Ms. Robbins referred him to each request for production and asked him what documents were responsive thereto. Mr. Svede responded that he possessed an accident log which was called for by at least one of the requests. Mr. Means testified that after the deposition, he went over the production requests with Mr. Svede numerous times to obtain his assistance in responding to the requests.[25] However, at the show-cause hearing, Mr. Svede claimed for the first time to have forgotten that the log, which was still in use, existed.

Mr. Svede's testimony, when considered alone, is incredible. Moreover, his testimony is contrary to Mr. Means' earlier testimony. As noted in section I of this opinion, Means stated as an officer of the court that he had reviewed Mr. Swede's log and had determined that it was not responsive to the plaintiffs' requests for production.[26] Despite these inconsistencies, however, the Government continues to ask this Court to believe that Mr. Svede, the Fort Worth USPS accident investigator, responsible for listing every accident in his own accident log which was kept in his own office, forgot that the log existed. It asks that we accept as true the "fact" that Mr. Svede could remember his log under the stressful conditions of a deposition, but could not remember that same log when he later reviewed the requests for production with Mr. Means.

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[25] *See, e.g., supra* note 8.

[26] *See supra* note 12.

We cannot accept the Government's ludicrous assertion that Mr. Svede was totally removed from the misconduct here. The district court's finding is amply supported by the evidence. We fail to see the injustice in sanctioning the Government for the misconduct of its representative in this case.[27]

3. Previous Sanctions

Highly supportive of the district court's decision to deem that the liability facts were established in this case is the fact that that court had previously sanctioned Mr. Means for discovery abuses. One would think that a $2500 sanction granted personally against the Government's attorney would have been warning enough that the district court would not tolerate any further discovery abuses. Since such was not the case, the district court was well within its discretion to grant the harsher sanction.[28]

Nevertheless, the Government complains that the district court should not have jumped to the sanction it chose, but should have granted a less harsh sanction instead. In the Government's view, only after disobeying the order compelling discovery *after* the imposition of a *second*, less-harsh sanction should it have been punished as severely as it was punished. This argument is without merit.

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[27] We have previously held that the misconduct of an attorney who has been continuously employed by a party supports the imposition of a default judgment against that party. *United States v. Shipco General, Inc.*, 814 F.2d 1011, 1014 (5th Cir.1987). There is no question but that Mr. Means, a Department of Justice attorney, was continuously employed by defendant United States in this case.

[28] In *United States v. Shipco General, Inc.*, the district court initially sanctioned Shipco $500 for ignoring its discovery obligations and the court's order compelling discovery. Because that sanction failed to coerce compliance on the part of Shipco, the district court dismissed Shipco's claims against the United States. We affirmed. 814 F.2d 1011 (5th Cir.1987).

Attorneys are professionals. They are, in every respect, officers of the court, and officers of the court must comply with each court order when it is issued—not after two or three warnings to do so and not after lesser sanctions are imposed. "It [should be] universally understood that a court's orders are not to be willfully ignored, and, certainly, attorneys are presumed to know that refusal to comply will subject them and their clients to sanctions." *Batson*, 765 F.2d at 515.

We conclude that the sanction granted against the Government was fair.

3. Related to the Claim Sought to be Proved by Discovery

The district court determined that the only reason the Government withheld the accident log was to prevent the plaintiffs from learning that a number of other customers had also fallen in the River Bend Post Office. Had the Government properly responded to the subpoenas duces tecum and requests for production, the plaintiffs would have been able to investigate those accidents and would likely have strengthened their liability allegations against the Government. Obviously, the Government's misconduct precluded that from happening.

When parties present no valid objections to discovery and intentionally withhold properly requested information, courts have the authority to presume that the party's refusal to produce the information is "an admission of the want of merit in the asserted defense." [29] *Hammond*,

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[29] The Supreme Court explicated:

> [B]eyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the

212 U.S. at 351, 29 S.Ct. at 380; *see also Insurance Corp. of Ireland,* 456 U.S. at 709, 102 S.Ct. at 2107. Based upon the facts of this case, we believe that the district court was well within its discretion to presume, for the purposes of this case, that the plaintiffs' liability claims were established.

4. Punishment and Deterrence

The Government argues that for such a relatively minor infraction, the district court should have granted a continuance rather than imposing the type of sanctions at issue in this case.[30] First, it must be clear that unless compelling reasons exist, this Court will not require a district court to inconvenience itself by rearranging its calendar to accommodate a malefactor who has violated its discovery obligations. *See Geiserman v. MacDonald,* 893 F.2d 787, 791-92 (5th Cir.1990).

Second, the Government's argument that its conduct was relatively minor and due solely to miscommunication and confusion makes it patent that the Government has yet to recognize that its conduct constituted serious infractions against the rules of discovery as well as against the district court, itself. Far from being relatively minor infractions, the Government's conduct, as discussed above, was willful, contumacious, and flagrant. Unfortunately,

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party refusing, justifying the rendering of a judgment by default, as if no answer had been filed.

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 352, 29 S.Ct. 370, 380-81, 53 L.Ed. 530 (1909).

[30] The Government additionally complains that it should not have been sanctioned because the plaintiffs were not prejudiced by its discovery abuses. While perhaps relevant to the type of sanction imposed, a party need not always be prejudiced by its opponent's discovery abuses prior to the imposition of sanctions. After all, the goal of sanctioning is not to reward the complying party, but to punish the infracting party and to deter others who may be want to engage in similar behavior. *See National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781.

the sting of the punishment imposed here failed to bring home to the Government that its actions in this case fell far below that which is acceptable. The Government's lack of concern about the behavior of its counsel and representative clearly demonstrates that it deserved the type of sanctions meted out here. However, even if the Government were to become penitent for its behavior, we do not believe that a lesser sanction would serve the deterrent purposes of Rule 37. *See National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781 (concluding that if the Supreme Court reversed the district court's decision to dismiss the case under Rule 37, "it might well be that [petitioner] would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts").

For the above stated reasons we affirm the district court's decision to deem the liability facts as established for the purposes of this case.

C. Propriety of Sanctioning Mr. Means

Although Mr. Means does not argue that the district court abused its discretion in sanctioning him, he does contend that by forbidding him from seeking reimbursement from the U.S. Government, the district court violated the separation of powers doctrine. Mr. Means asserts that as a member of the executive branch, and, more specifically, the Justice Department, the Attorney General—and not a member of the judiciary—is to discipline him.[31]

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[31] Mr. Means also refers the Court to regulations which allow the Justice Department to reimburse employees who have been sued in their individual capacities. Our review of those regulations, however, fails to reveal that they are inconsistent with the district court's decision here. The relevant section is entitled "Representa-

Congress has made it abundantly clear that it intends for Government attorneys to be treated the same as private attorneys. Amending 28 U.S.C. section 2412 in the Equal Access to Justice Act ("EAJA"), Congress determined that the Government should be held liable for attorney's fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b). The House Committee on the Judiciary explained that the change in section 2412, which took effect in October 1981, simply "reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties." HOUSE COMM. ON THE JUDICIARY, EQUAL ACCESS TO JUSTICE ACT, H.REP. NO. 96-1418. 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4984, 4987, 4996. Moreover, the EAJA specifically deleted subsection (f) of Rule 37,[32] which had precluded courts from imposing discovery

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tion of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities." 28 C.F.R. § 50.15 (1992). Subsection (c)(1) provides that the "Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee . . ." *Id.* at § 50.15(c)(1).

This language is inapplicable in the situation before us: The regulation evinces no intent whatever to restrict a court's authority to impose sanctions against government employees. Even if an inconsistency existed, however, the Federal Regulations, which do *not* have the force of a federal statute, would have to bow to the Federal Rules of Civil Procedure, which do. *See Sibbach v. Wilson and Co.*, 312 U.S. 1, 13, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941).

[32] Subsection (f) provided: "EXPENSES AGAINST UNITED STATES. Except to the extent permitted by statutes, expenses and fees may not be awarded against the United States under this rule." *See* 4A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 37.01[11] (2d Ed.1992).

sanctions on the United States.[33] Equal Access to Justice Act, Pub.L. No. 96-481, § 205; *see also* 1980 U.S.C.C.A.N. at 4998.

By taking away the Government's protection from Rule 37 sanctions, Congress could not have been clearer in revealing its intent to subject the Government and its attorneys to Rule 37(b)(2)(E) which provides that, except in circumstances not at issue in this case, district courts are to order the recalcitrant party, the attorney, *or both,* to pay reasonable expenses, including attorney fees, to the opposing party for violations of discovery orders.[34]

There is no question but that a court can forbid a private attorney from seeking reimbursement from clients or employers under Rule 37. *See Shipes*, 987 F.2d at 323 ("Under Rule 37(b), [the attorney] may be personally liable for reasonable expenses, including attorneys' fees, caused by his failure to comply with a discovery order."); *Derechin v. State University of New York*, 963 F.2d 513 (2d Cir.1992) (upholding a district court's decision to forbid a state-employed attorney from seeking reimbursement from the state). In fact, the Supreme Court, construing Rule 11, determined that the punishment and deterrent effects of sanctions are *maximized* when awarded against the attorney personally:

> The purpose of the provision in question [which empowers courts to sanction persons or entities for the

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[33] Interestingly, the committee stated that it believed the EAJA would "make the United States proceed more cautiously" in judicial and administrative proceedings. 1980 U.S.C.C.A.N. at 4999.

[34] The rule reads:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. FED.R.CIV.P. 37(b)(2)(E).

> signing of frivolous documents], however, is not reimbursement, but "sanction," and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these purposes* are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, [is] that this is not a "team effort" but in the last analysis [is] *yours alone*. . . . Moreover, . . . there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership . . ."

Pavelic and LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126, 110 S.Ct. 456, 460, 107 L.Ed.2d 438 (1989) (emphasis in original).

We believe the reasoning in *Pavelic and LeFlore* holds true for Rule 37 sanctions. The district court's decision to prevent Mr. Means from seeking reimbursement was not inconsistent with the goals of Rule 37.[35]

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[35] *Blue v. United States Department of the Army* is inapposite to the facts of this case. There, the district court forbade the NAACP from reimbursing one of the attorneys who had been sanctioned, reasoning that NAACP members should not have to pay for the transgressions of the attorney. 914 F.2d 525, 549 (4th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1580, 113 L.Ed.2d 645 (1991). Unlike this case, the NAACP was not involved *in any way* with the litigation in *Blue*. It was not a party, and it did not supply the attorney. The Fourth Circuit reversed, concluding that the district court had no authority to tell the NAACP, an entity which was not involved in the case, how *not* to expend its monies.

While it is certainly true that the district court in the case *sub judice* commented that taxpayers should not be penalized for

That Congress has allowed federal courts to sanction Government attorneys in the same manner that those courts sanction private attorneys does not answer Mr. Means' contention that such a rule is violative of the separation of powers doctrine. It goes without saying that any rule which violates the Constitution, even if authorized by federal statutes, must be struck down. However, we believe that such is not the case here.

Contrary to Mr. Means' contention that the district court's decision violated the separation of powers doctrine, we believe that to *restrict* a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch,[36] would violate the separation of powers doctrine.[37] Such a decision would invite members of our

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the misconduct of Mr. Means, the record in this case shows all too clearly that, unlike the district court in *Blue*, this district court's primary reason in precluding Mr. Means—who *was* at all times involved in this litigation—from seeking reimbursement was to punish Mr. Means for his flagrant disregard of his discovery obligations. Such a reason for imposing sanctions is entirely appropriate. *National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781; *See Derechin v. State University of New York*, 963 F.2d 513 (2d Cir.1992) (upholding district court's decision to prohibit state attorney from seeking reimbursement).

[36] Governmental attorneys should model the ideals of integrity and ethics rather than attempt to circumvent them. *See Perry v. Golub*, 74 F.R.D. 360, 366 (N.D.Ala.1976) (asserting that public interest dictates that the Government, more than any other entity, comply with court orders).

[37] The Government contends that prohibiting Government attorneys from seeking and receiving reimbursement may inhibit such attorneys from vigorously representing the Government and espousing unpopular, yet necessary, legal positions. This "chilling" argument has no more force when invoked by the Justice Department than when invoked by opponents of Rule 11 of the Federal Rules of Civil Procedure. As long as district courts use their sanction authority carefully, no such effects will occur. In any event, appellate review will, in appropriate cases, deter excessive or unwarranted sanctions by the district courts.

sister branches to ignore acceptable standards of decorum in courts and flout court orders. Indeed, to rule as Mr. Means requests would rob federal courts of power they inherited at their inception: power to preserve order in judicial proceedings and enforce judgments.[38] This Court recently ruled that it would not hesitate to strike down any law which weakens the judiciary's power to enforce its orders as unconstitutionally violative of the separation of powers doctrine. *In re Stone*, 986 F.2d 898, 902 (5th Cir.1993). We refuse to now approve of that which we have so recently condemned—the erosion of a district court's authority to properly compel compliance with its orders. *See McBride v. Coleman*, 955 F.2d 571, 582-83 (8th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992) (Lay, C.J., dissenting) (concluding that "[i]t would seriously erode our system of separation of powers if the executive branch was (sic) effectively immune from the judicial power. The federal courts must have the inherent authority to enforce exe-

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[38] So important and deeply rooted is the federal courts' authority to enforce their orders and punish willful infractions thereupon that the seventeenth section of the Judiciary Act of 1789 provided that all federal courts "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." *As quoted in Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 22 L.Ed. 205 (1873). Writing for the Court in *Ex parte Robinson*, Justice Field began his opinion as follows:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. *The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.*

Id. (emphasis added); *see also United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 33, 3 L.Ed. 259 (1812) (asserting that "[t]o fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . .").

cutive branch compliance with judicial orders. . . . Otherwise, the judiciary would be powerless to impose the most effective remedy for ensuring compliance with its orders against the most frequent litigant in the federal courts").

III. Conclusion

The decision of the district court is AFFIRMED, and we tax all costs and attorney's fees for this appeal against the Government.

EDITH H. JONES, Circuit Judge, concurring specially:

I concur with all of Judge Johnson's fine opinion except for the following bit of dicta:

> To *restrict* a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine. (footnotes omitted). (emphasis added)

This is as unfortunate an overstatement as the government's contrary proposition that Judge McBryde's order preventing Means from seeking reimbursement from the Justice Department somehow ***violates*** the separation of executive and judicial powers. This court recently described the scope of a court's sanction against the backdrop of the constitutional separation of powers and concluded that sanctions fall within the court's inherent powers "necessary to the exercise of all others." ***In re Stone***, 986 F.2d 898, 902 (5th Cir.1993), citing ***Roadway Express v. Piper***, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980).[1] ***Stone*** then says:

> Congress may interfere with this category of inherent power within "limits not previously defined," so long

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[1] I do not know whether *Stone's* analysis of inherent powers, borrowed from an Eighth Circuit case, is fully valid. The Supreme Court declined to approve the Eighth Circuit analysis in *Chambers v. NASCO, Inc.*, —— U.S. —— n. 12, 111 S.Ct. 2123 n. 12, 115 L.Ed.2d 27 (1991), but I do not rely upon that aspect of *Stone*.

> as it does not abrogate or render the specific power inoperative. *Id.*, citing *Michaelson v. U.S.*, 266 U.S. 42, 65-66, 45 S.Ct. 18, 19-20, 69 L.Ed. 162 (1924).

On the same page, *Stone* says that

> If the power belongs in the . . . category [of sanctions], we must ascertain whether a valid statute or rule attempts to regulate the court's use of the power. If such a law exists, we then must determine whether the law abrogates or renders the power practically inoperative. *Id.*, citing *Michaelson*, 266 U.S. at 66, 45 S.Ct. at 20.

Stone disposes of this case. That the government says there is a violation of the separation of powers doctrine does not *ipso facto* make it so. The government's concern is too speculative upon the facts before us. First, contrary to the Justice Department's argument, it is not at all clear that its regulation bears on, much less purports to limit the court's independent power to determine how it will sanction a government employee. Second, the Justice Department offered no evidence or argument that Means *would* qualify for reimbursement *but for* the district court's order. Further, the government does not assert that the district court's order actually impinged upon the policy and personnel interests that it asserts are protected by immunity from such an order. These facts counsel against our rushing to opine upon an important constitutional issue. If the regulation affected the court's sanction power to the limited extent of preventing the court from issuing a sanction against an assistant United States attorney individually and non-reimbursably, it appears to me that such a regulation would not render this court's inherent sanction power "inoperative". A court has numerous other types of sanction remedies available against the federal government and its attorneys even if this one is not. To decide this point precisely is, however, unnecessary. The government's argument fails on the facts before us.

APPENDIX B

[Filed May 26, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

On May 22, 1992, came on for pretrial conference and hearing the above-styled and numbered action. Plaintiffs, Brenda Chilcutt and The Home Insurance Company, and defendant, United States of America, appeared by and through their attorneys of record. In accordance with the court's rulings at the hearing,

The court ORDERS that:

(1) At 1:00 p.m. on Wednesday, May 27, 1992, defendant shall produce, in the offices of Kelly F. Robbins, counsel for plaintiffs, the originals of each and every item ever requested by plaintiffs in a request for production, or a *duces tecum* list, for inspection and copying by counsel for the plaintiffs. The documents shall be accompanied by an affidavit, if it honestly can be made, a duplicate original of which shall also be filed with the Clerk by 1:00 p.m.

on May 27, 1992, signed by Randell Means, counsel for defendant, in which each item produced shall be lisited and described and which shall state (a) that every item responsive to plaintiffs' discovery requests has been produced, and is listed in the affidavit, (b) that he has made inquiries of such a nature as to be calculated to disclose the existence of any item of any kind or character called for by any of plaintiffs' discovery requests, (c) the identity (by name, name of employer and job title) of each person he contacted with regard to ascertaining the existence of and locating items responsive to plaintiffs' requests, and (d) the response of each person contacted;

(2) If Randell Means cannot honestly make the affidavit contemplated by item (1) above, he shall file with the Clerk by 1:00 p.m. on May 27, 1992, an affidavit signed by him in which each item produced shall be listed and described and which shall describe in detail each and every reason why he is unable to make an affidavit of the kind contemplated by item (1) above;

(3) At 1:00 p.m. on Wednesday, May 27, 1992, defendant shall produce, in the offices of Kelly F. Robbins, counsel for plaintiffs, for inspection and copying by her, the originals, organized in chronological order, of all records of Marilyn Chapman from January 1, 1986, through January 1, 1992, regarding (a) the accident that is the subject of this action or (b) the employment and all activities by her, and any one acting on her behalf, as contractor for the government;

(4) At 1:00 p.m. on Thursday, May 28, 1992, defendant shall produce in the offices of Kelly F. Robbins, counsel for plaintiffs, Marilyn Chapman so that plaintiffs' counsel can at that time take her oral deposition;

(5) Immediately prior to or following the deposition of Marilyn Chapman on May 28, 1992, counsel for the parties shall confer in person with the goal of determining whether additional facts can be the subject of stipulation between the parties;

(6) On or before 10:00 a.m. on Friday, May 29, 1992, the parties shall file a supplement to the pretrial order in which they shall set forth such additional facts with regard to which they have been able to reach stipulation;

(7) The court holds in abeyance the request by plaintiffs for sanctions based on the failure of defendant to comply with its discovery obligations, except, being unable to find that such failure by defendant was substantially justified or that other circumstances make an award unjust, the court is awarding to plaintiffs against Randell Means, counsel for the government, recovery of all reasonable expenses, including attorneys' fees, caused by the failure of defendant to comply with its discovery obligations, which will include fees and expenses devoted to preparation and service of Plaintiffs' Motion for Sanctions, and Motion to Compel Answers to Interrogatories and Request for Production, attendance at the hearing held May 22, 1992, preparation for presentation of plaintiffs' motions at such hearing, and the taking of the deposition of Marilyn Chapman;

(8) If plaintiffs wish to pursue the matter of recovery of fees and expenses contemplated by part (7) above, plaintiffs' counsel shall file and serve on or before Friday, May 29, 1992, a statement of all fees and expenses claimed by plaintiffs, which shall be itemized in detail and must be supported by the affidavit of counsel for the plaintiffs;

(9) Randell Means shall have until 4:00 p.m. on Monday, June 1, 1992, within which to respond

to any statement filed and served pursuant to the authority of item (8) above; and

(10) Plaintiffs are granted leave to file, on or before 4:00 p.m. on Monday, June 1, 1992, any motion made necessary by any inadequacy in discovery responses and conduct of defendant that has not been the subject of a prior motion.

SIGNED May 26, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX C

[Filed Jun. 2, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT AND
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

On June 1, 1992, came on for hearing the above-styled and numbered action. Plaintiffs, Brenda Chilcutt and The Home Insurance Company, and defendant, United States of America, appeared by and through their attorneys of record. In accordance with the court's rulings at the hearing,

The court ORDERS that:

(1) On or before 2:00 p.m. on June 2, 1992, defendant shall file an itemization of all work done and expenses, including the dollar value thereof, incurred by the government in representing Mr. Means, individually;

(2) In keeping with the rulings made by the court in paragraph 7 on pages 3 and 4 of the order signed by the court May 26, 1992, on or before 2:00 p.m. on June 8, 1992, Randell Means, individually, shall

pay the sum of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($2,500.00) to plaintiffs, by and through Kelly F. Robbins, as reasonable expenses, including attorney's fees, caused by the failure of defendant to comply with its discovery obligations;

(3) On or before 10:00 a.m. on June 9, 1992, Randell Means, individually, shall file an affidavit in which he verifies that he has paid the $2,500.00 sanction with his own personal funds and that he has not sought or received, and will not seek or receive, reimbursement from the government for all or any part of such sum;

(4) On or before 2:00 p.m. on June 3, 1992, defendant shall file its response, if any, to plaintiff's supplemental motion for sanctions filed June 1, 1992; and

(5) The parties be, and are hereby, granted an extension until 4:00 p.m. on June 2, 1992, in which to file their exhibit lists, witness lists and proposed findings of fact and conclusions of law. Additionally, the parties shall file on or before 4:00 p.m. on June 2, 1992, a revised supplement to the pretrial order in keeping with the instructions given by the court at the hearing held June 1, 1992.

SIGNED June 2, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX D

[Filed Jun. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT AND
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Came on to be heard on June 4, 1992, plaintiffs' supplemental motion for sanctions. Appeared before the court plaintiff Brenda Chilcutt, who appeared in person and by and through her attorney of record; plaintiff The Home Insurance Company, by and through its attorney of record; and defendant, United States of America, by and through its attorney of record. As the court announced at the commencement of the hearing, the record of the hearing includes the records of the hearing held May 22, 1992, and the hearing held June 1, 1992. For the reasons stated by the court into the record, the court has determined that, as sanctions, the following designated facts, as set forth in 1, 2, 3 and 4 below, shall be taken to be established for the purposes of this action:

1. The place where plaintiff Brenda Chilcutt fell on the occasion in question was unreasonably slick

and hazardous to anyone walking at that place on that occasion.

2. Defendant, United States of America, knew, prior to Brenda Chilcutt's fall on the occasion in question, of the existence of the condition that caused her to fall and knew that such condition created an unreasonable risk of harm to invitees, such as Brenda Chilcutt.

3. Such condition existed on the occasion in question because of negligent conduct on the part of defendant and because of defendant's failure to exercise that degree of care that a person of ordinary care and prudence would have exercised under the same or similar circumstances.

4. The fall Brenda Chilcutt suffered on the occasion in question was proximately caused by such negligent conduct.

(The words "on the occasion in question", as used in 1, 2, 3 and 4 above, mean the occasion on or about October 4, 1988, when Brenda Chilcutt had a fall at premises occupied by the United States Postal Service, to which the parties refer in section (f) on pages 2-3 of the Pretrial Order filed in this action on May 22, 1992.)

The court has concluded that the sanction defined by this order is just, under the circumstances, considering the failures of defendant to honor its discovery obligations.

The court, therefore, ORDERS that each of the facts set forth in 1, 2, 3 and 4 above be, and are hereby, taken to be established for the purposes of this action.

SIGNED June 4, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX E

[Filed Jun. 6, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM AND ORDER

Came on to be considered the motion of United States of American and Randell P. Means to stay execution of the June 1, 1992, order of the court. From the contents of the motion and its supporting memorandum, the court assumes that the motion and supporting memorandum are intended to have reference to (i) the order signed by the court June 2, 1992, pertaining to payment by Randell Means of reasonable expenses to counsel for the plaintiff in this action because of the failure of defendant, United States of America, to comply with its discovery obligations, and (ii) rulings made from the bench on those subjects on June 1, 1992.

The court conducted a hearing in this action on May 22, 1992, on motions filed by plaintiffs, Brenda Chilcutt and The Home Insurance Company, for sanctions and to compel defendant, United States of America, to answer inter-

rogatories and to respond to a request for production, both of which discovery requests had been served by plaintiffs on defendant in March 1992. Plaintiffs proved, and defendant, through counsel, admitted, that defendant had not answered the interrogatories or responded to the request for production prior to the filing of plaintiffs' motions, even though the time for answer and response had expired weeks before the motions were filed. At the conclusion of the May 22 hearing, the court made orders from the bench, which included an order awarding to plaintiffs against Randell Means, as counsel for defendant, recovery of all reasonable expenses, including attorney's fees, caused by the failure of defendant to comply with its discovery obligations. The order was made pursuant to the authority of Fed. R. Civ. P. 37(d), which provides, *inter alia,* that, in the event of failures of a party to comply with his or her discovery obligations, the court, in lieu or in addition to an order of sanctions, "shall require the party failing to act *or the attorney* advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." (emphasis added). As expressed into the record at the hearing, the court was unable to conclude that the failure of defendant to comply with its discovery obligations was substantially justified or that other circumstances would make an award to plaintiffs of expenses unjust. The court explained why the award was not being made against defendant, but, instead, was being made against defense counsel by saying:

> The recovery will be against the attorney for the government and not the government. I don't think that this sort of thing should be borne by the taxpayers.

Rough draft of partial transcript of May 22, 1922, hearing, at 6. The rulings made by the court at the May 22 hearing were reduced to writing by an order signed by the court on May 26, 1992.

On June 1, 1992, the court heard the parties on the subject of the amount of the expenses that should be awarded to plaintiffs against Mr. Means; and, the court determined that an appropriate award would be $2,500.00. The rulings made by the court at the June 1 hearing were reduced to writing by order signed June 2, 1992. In keeping with the intent of the court that Mr. Means, and not the defendant, would be the one to bear the burden of the payment, the court ordered that Mr. Means not seek or receive reimbursement from the government for all or any part of the $2,500.00 payment he was obligated to make; and, the June 2 order directed that, after Mr. Means has made the $2,500.00 payment, he "shall file an affidavit in which he verifies that has has paid the $2,500.00 sanction with his personal funds and that he has not sought or received, and will not seek or receive, reimbursements from the government for all or any part of the sum."

Implicit in the motion of United States of America and Mr. Means to stay execution is the argument that the part of Rule 37 that authorizes the court to order payment by an attorney, instead of the attorney's client, of an award of reasonable expenses does not apply to an attorney representing United States of America or one of her agencies if that attorney happens to be an employee of the Department of Justice. The premises of this argument are (i) that 28 U.S.C.§§ 516 and 519 give the Department of Justice, under the direction of the Attorney General, the responsibility to conduct and supervise litigation to which the United States of America is a party and to direct all United States Attorneys and Assistant United States Attorneys in the discharge of their respective duties and (ii) that the regulation of the Department of Justice that appears at 28 C.F.R. 50.15(c)(1) (to the effect that the Department of Justice may idemnify an employee of the Department of Justice for any verdict, judgment, or other monetary award rendered against the employee, under certain circumstances) is inconsistent with, and prevails over, any power

the court otherwise might have to order that Mr. Means personally bear the burden of the expense payment the court ordered Mr. Means to make.

The net effect of the argument of defendant and Mr. Means is that the Department of Justice has the power to exempt itself from a rule of the Federal Rules of Civil Procedure, or any rule or order of the judiciary, by the simple expedient of adopting a regulation that says it will not be bound by, or that is inconsistent with, the rule or order. The court is not persuaded that the Department of Justice has that power. Indeed, the court is convinced that there would be chaos in the federal court system if the head counsel for the system's major litigant were to be permitted to pick and choose the rules and orders of the judiciary to which the counsel and his client might wish to be bound.

There can be no doubt that, generally, the court has the power to ensure that the attorney, rather than the client, bear the brunt of an expense or sanction award by ordering that the attorney pay the award personally and not receive reimbursement from the client. *See Derechin v. State University of New York,* —— F.2d ——, 1992 WL 83274 (2nd Cir. 1992).[1] If the court did not have the power to prevent the sanctioned attorney from receiving reimbursement, the words in Rule 37 that authorize the award of expenses to be against the attorney, and not the client, would be meaningless. There is no rational basis for exempting United States of America and its

[1] In *Derechin,* the Second Circuit considered the problem in a Fed. R. Civ. P. 11 context. The trial court had ordered that a sanction be imposed on defense counsel and further ordered that defense counsel pay the sanction "personally and without reimbursement from a client or clients or employer." The Second Circuit held that the prohibition against reimbursement should be upheld even though it prevented the attorney, an Assistant Attorney General of the State of New York, from receiving the benefit of a New York statute that arguably gave the Assistant Attorney General the right to be indemnified by the State of New York for the sanction payment.

counsel, even if the attorney is an employee of the Department of Justice, from the judicial power that is required to fully effectuate Rule 37.

Moreover, even if one were to assume that United States of America and Mr. Means could prevail in their appeal from the order that Mr. Means cannot be reimbursed by defendant for his payment of the award of expenses, the court has no reason to think that, if such a reversal were to occur, defendant would not have the wherewithal to reimburse Mr. Means. There has been no suggestion by defendant or Mr. Means that defendant would not be able to accomplish reimbursement at a later date if the appellate court were to conclude that Mr. Means is entitled to be reimbursed. Consequently, there is no necessity, in any event, for a stay of execution of the order of which defendant and Mr. Means complain.

For the reasons given above, the court has concluded that there is no just reason why the motion of defendant and Mr. Means for stay of execution of the court's order should be granted.

The court, therefore ORDERS that the motion of United States of America and Randell P. Means for stay of execution be, and is hereby, denied.

SIGNED June 6, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX F

[Filed Jul. 1, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER
(Under Seal)

During the hearings that were held in late May and early June 1992 in the above-styled and numbered action, the court became concerned with certain representations concerning discovery matters that were being made to the court by Randell P. Means, who has served as counsel for defendant, United States of America, in this action. Representations made by Mr. Means were factors the court considered in deciding on the severity of the sanctions that were imposed on defendant for its discovery abuses, but, before deciding whether disciplinary action against Mr. Means should be considered, the court has waited for an opportunity to review transcripts of the hearings. After having studied the transcripts, the court's concern with the conduct of defense counsel is heightened.

The area of greatest concern has to do with apparent misrepresentations by Mr. Means to the court about the accident log on which the accident of plaintiff Brenda (Chilcutt) Wortham was recorded. U.S. Postal Service MSE Accident Investigator Al Svede prepared the log.[1] The page of the log on which Ms. Chilcutt's accident is recorded is within the scope of requests that are contained in a request for production of documents served by plaintiffs on defendant in March 1992. Defendant had not responded to the request for production by the time of the hearing that was held May 22, 1992, on Plaintiffs' Motion for Sanctions, and Motion to Compel Answers to Interrogatories and Request for Production.

At the May 22 hearing, and by written order signed May 26, 1992, defendant was ordered to produce on May 27, 1992, for inspection and copying by counsel for the plaintiffs each and every item ever requested by plaintiffs in a request for production, or a *duces tecum* request; and, defendant was directed to verify by affidavit of Mr. Means facts concerning the document production that was to be made by defendant. The accident log was not produced by defendant. On May 27, 1992, defendant filed a response to plaintiffs' request for production, which was signed by Mr. Means. The response did not disclose the existence of the page of the accident log on which Ms. Chilcutt's accident was recorded; and, the response falsely indicated that there was no such thing in existence. The declaration[2] made by Mr. Means, in purported compliance with the directive of the May 26, 1992, order for verification by defense counsel concerning the document production, falsely indicated that all docu-

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[1] The page of the accident log in question entitled "U.S. Postal Service Non-Vehicle Accident Register", was identified as court's Exhibit "1" at the June 4, 1992, hearing in this action.

[2] The declaration, which was filed May 27, 1992, is entitled "Defendant's Affidavit of Compliance: Plaintiff's [sic] Request for Production of Documents and Things."

ments to which defendant had access of a kind called for by the request for production had been produced. In reference to the requests that were broad enough to call for production of the accident log, the declaration of defense counsel suggested that the log was not in existence. For example, in reference to request No. 28, which clearly called for the log, Mr. Means declared under penalty of perjury that "[t]here are none"; and, he identified Al Svede as his contact person (the person with whom he discussed existence, *vel non*, of the items called for by the request).

On June 1, 1992, plaintiffs filed their supplemental motion for sanctions, in which plaintiffs complained, *inter alia*, about the failure of defendant to produce the accident log. In reference to the failure of defendant to produce the accident log that had been prepared by Al Svede, defendant said in its response to plaintiffs' supplemental motion for sanctions, which response was signed by Mr. Means, that:

> Plaintiff further complains that Al Svede has not produced his own log relating to the same topic. Defendant has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's request. There being no information of the type sought, as established by a complete search of the proper records of Defendant and the certified answer of Defendant, there is no violation of this Court's orders shown.

At the hearing held June 4, 1992, on plaintiffs' supplemental motion for sanctions, counsel for plaintiffs made further complaint about the failure of defendant to produce the accident log. *See e.g.* Transcript of Proceedings of June 4, 1992 ("Tr. 6/4/92") at 45. When plaintiffs' counsel pursued the matter, the following exchanges occurred:

THE COURT: Well, why haven't those accident logs been produced?

MR. MEANS: Your Honor, as our motion sets out, the request related specifically to anything that dealt with these premises. *A search has been conducted of those accident logs, as we have set out in our response to this supplemental motion, and there is no record in those logs relating to any accident or complaint on the premises of River Bend for the time—*

THE COURT: Well, that takes care of it. That's what she has asked for.

And if you can at some point in time prove they misrepresented to you in saying that there is nothing, then they have got a different problem. But so far the representation is that there is nothing.

MS. ROBBINS: Well, Your Honor, we do know of two accidents that occurred at that premises, and they would be listed in that log.

THE COURT: Well, I have got to assume they don't do a very good job of keeping their records because *it's been represented that there is no record of those accidents.*

Is that what you are representing?

MR. MEANS: *That is correct, Your Honor.*

THE COURT: Even though there are two other accidents on the premises, the post office department did not keep a record in any of its logs, accident logs or other books, of those accidents.

MR. MEANS: There is one accident that was reported. That is the Chilcutt[3] accident this case is based on. And my representation is the same as what is reflected here. *Yes, Your Honor, there is no record of that in this log.*

She refers to a second accident that occurred, and no further reporting was made. And the document

[3] The name "Chilcutt" is misspelled "Chillcut" throughout the transcript. The court has taken the liberty to use the correct spelling in all language taken from the transcript.

that was filled out at the scene of the River Bend post office and has remained at that location has been produced, and there is no other notation in the log of that transaction.

MS. ROBBINS: I'm sorry. Is there any notation in the log about it or not other besides that?

THE COURT: He said there's no notation in the log.

MS. ROBBINS: No other, or no notation.

MR. MEANS: *There is no record.*

As our response to this supplemental motion states, I am stating under oath before the court as an officer of the court that my representations in that motion are correct, that a search of that log has been conducted, and no accident has been identified to the time periods in that log—and I believe it's 1987 through the present—for the premises, River Bend Finance Unit, for both employee accidents or complaints or customer accidents.

Tr. 6/4/92 at 48-50 (emphasis added). And:

THE COURT: Well, I guess what I am going to have to do, then, I am going to have to let Mr. Means represent to me as an officer of the court that he views his response to be true and correct; that is, Defendant's Response to Plaintiff's Supplemental Motion for Sanctions, which was filed by the defendant yesterday, June 3, 1992.

Do you make that representation?

MR. MEANS: *I do certify that [representation][4] under oath, Your Honor, that I made the examinations and conferred with the individuals noted therein.*

THE COURT: *I am just asking you: Do you represent that everything in that response is true and correct?*

MR. MEANS: *Yes, Your Honor.*

Id. at 51-52 (emphasis added).

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[4] In the transcript the word "representation" is incorrectly shown as "reputation."

When plaintiffs' counsel continued to insist at the June 4 hearing that documents pertaining to plaintiff Chilcutt's accident were being withheld, the court decided that the appropriate thing to do would be to order Mr. Svede, and another potential witness, to appear before the court at 2:00 p.m. on that date with certain documents, including accident logs. *Id.* at 60. At a later point in the proceeding, before Mr. Svede appeared before the court, the following exchange occurred as the court and counsel were discussing records that had not been produced by defendant:

> MR. MEANS:
>
> . . . .
>
> And the record of accidents or conditions on the premises are the accident logs that have been described earlier, and those have been served and are maintained locally—
>
> THE COURT: But apparently they are not complete.
>
> MR. MEANS: *Apparently they do not have a copy or any representation of the Chilcutt transaction.* And that's the only evidence to indicate that they are incomplete, because that's the only report that has been verified that actually occurred.
>
> THE COURT: Well, it turns out to be kind of important in this case. *The very accident involved in this lawsuit doesn't happen to be in the log.*
>
> MR. MEANS: *Yes, Your Honor. But all the records pertaining to this accident have been presented. There is not anything that failure to produce the log entry fails to show.*

Id. at 71 (emphasis added).

When Mr. Svede appeared before the court the afternoon of June 4, he readily acknowledged, upon questioning by the court, that he listed plaintiff Chilcutt's accident in his log:

Q. Did you list Ms. Chilcutt's accident in your accident log?

A. Yes, I did.

Id. at 95.

Mr. Svede produced the accident log, which showed the entries he made pertaining to plaintiff Chilcutt's accident and also showed that three other United States Postal Service patrons had suffered falls in lobbies of United States Postal Service facilities in Fort Worth relatively near in time to plaintiff Chilcutt's accident. *See* court's Exhibit "1" to 6/4/92 hearing. Plaintiffs' counsel had never seen the accident log until witness Svede produced it at the June 4 hearing. *See e.g. Id.* at 99 and 101.

When Mr. Means was confronted with the truth concerning the accident log, his only excuse for not having previously produced it was:

THE COURT: Okay. Why has she not seen that before today, Mr. Means?

MR. MEANS: It is not covered by any document production request or subpoena duces tecum. The search that was conducted—

Tr. 6/4/92 at 105. Counsel for defendant disclaimed "any trickery or improper motive on the part of defendant United States, particularly the client defendant United States and U.S. Postal Service":

THE COURT: Well, you are entitled to disagree with the court.

While you are disagreeing I might also point out that, if the government had honestly responded to the request for production, it also would have produced the request for production, it also would have produced the investigation logs in response to item 28 of the request for production, which clearly called for the entry in that log pertaining to Ms. Chilcutt's accident, which would have then caused the page of the log that we were referring to during the course of the hearing to be produced.

MR. MEANS: To the extent that item 28 would refer to the plaintiff's own request, Your Honor, I can not quarrel with the court's characterization. I would only submit—and *I recognize my credibility at this moment before this court may not be much* —but I submit that accident log page was not withheld as a result of any trickery or improper motive on the part of the defendant United States, particularly the client defendant United States and U.S. Postal Service.

And, personally and professionally as counsel, it was, as discussed in the—

THE COURT: Okay. You have run out of time.

MR. MEANS: I will draw the court's attention to Exhibit B that does discuss the log. And that's all I would have, Your Honor.

Id. at 144 (emphasis added). Yet, Mr. Means never gave any satisfactory explanation for his misrepresentations to the court relative to the accident log that was produced by defendant only after the court ordered Mr. Svede to appear before the court.

The appearance is that Mr. Means might well:

(a) be guilty of contempt of the authority of the court in violation of Title 18, United States Code, § 401;

(b) be incompetent to practice before this court because of unethical behavior and, perhaps sheer inability to conduct litigation properly, within the contemplation of Rule 13.2, Local Rules of the United States District Court for the Northern District of Texas;

(c) have signed papers of United States of America in violation of the certifications requirements of Fed. R. Civ. P. 11 [5]; and

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[5] Rule 2.1(f) of the Local Rules of the United States District Court for the Northern District of Texas provides, in pertinent part, that "[t]he provisions of Rule 11 of the Federal Rules of Civil Procedure must be strictly enforced."

(d) have subjected himself to disciplinary action under the inherent powers of the court.

The court recognizes the significance of the possibility that the conclusion might be reached that a member of the staff of the United States Attorney for the Northern District of Texas has been guilty of criminal conduct in his dealings with the court. Therefore, the court intends to proceed with special caution. The court is directing the Clerk to place this order under seal, at least for the time being. Moreover, rather than to issue at this time an order for a formal show cause hearing, the court is giving Mr. Means opportunity to explain his conduct at a less significant hearing, which might be characterized as a "hearing preliminary to the possible issuance of a show cause order" (hereinafter "preliminary hearing"). However, such a preliminary hearing will be held only if Mr. Means requests such a hearing. If Mr. Means prefers to proceed directly to issuance of a show cause order, he should so advise the court.

The court ORDERS that Randell P. Means shall have until 4:00 p.m., Monday, July 6, 1992, within which to file with the Clerk a document, which will be filed under seal if the caption of the document indicates that it is to be sealed, in which he informs the court of his wishes with respect to the holding of a preliminary hearing concerning to the matters mentioned in this order; and the court further ORDERS that plaintiffs and defendant have leave to file on or before such time and date any item they wish to file in reference to the subject matter of this order and that if any such item is filed it shall indicate in its caption that it is to be sealed.

The court further ORDERS that the Clerk shall place this order, as well as documents that are filed pursuant to the directive or authorization given above, under seal, subject to further order of the court.

SIGNED July 1, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX G

[Filed Jul. 28, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

On July 28, 1992, came on for hearing, pursuant to the court's order of July 7, 1992, the above-styled and numbered action. Plaintiffs, Brenda Chilcutt and The Home Insurance Company, appeared by and through their attorney of record. Randell P. Means appeared by and through his attorney of record. Having heard the evidence and arguments presented, the court determined that, whether the conduct was intentional or grossly negligent, entry of the following order would be appropriate:

The court ORDERS that:

(1) All orders under seal be, and are hereby, unsealed.

(2) A transcript of the hearing of July 28, 1992, be included as part of the record on appeal, in the

event any of the court's rulings in this action are appealed.

(3) On or before November 1, 1992, Randell P. Means shall attend fifteen (15) hours of a course or courses at an accredited school or through continuing legal education programs sponsored or approved by the State Bar of Texas on the subject of ethics or professional responsibility, tuition for which shall be paid by Means, individually, and he shall not seek or accept reimbursement from any person or entity. On or before November 16, 1992, Randell P. Means shall file an appropriate affidavit setting forth with specificity everything he has done to comply with this order. After the affidavit is received and reviewed, the court will decide whether further information about, or proof of attendance at, such course or courses should be required.

(3) On or before August 29, 1992, Randell P. Means shall pay to Kelly Robbins, counsel for plaintiffs, the sum of SIX HUNDRED TWENTY-FIVE DOLLARS ($625.00), which shall be paid by him individually and for which he shall not seek or accept any reimbursement from any person or entity.

The court considers that Randell P. Means is on something in the nature of probation with the court in the sense that the court will take into account his conduct in this action if the court has occasion in the future to determine whether sanctions should be imposed on, or disciplinary action should be taken against, him in the event he again engages in inappropriate conduct in his dealings with the court or in matters before the court.

SIGNED July 28, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1668

BRENDA CHILCUTT and HOME INSURANCE COMPANY,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant,

RANDELL P. MEANS, in his individual capacity,
Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(December 22, 1993)

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs

VS.

UNITED STATES OF AMERICA,
Defendant

Fort Worth, Texas
July 28, 1992

TRANSCRIPT OF PROCEEDINGS
(Hearing Preliminary to Issuance of Show Cause Order)

BEFORE THE HON. JOHN MCBRYDE,
United States District Judge

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[3] PROCEEDINGS

THE COURT: Good morning.

Okay. We're here on No. 4:91-CV-277-A. We're here pursuant to an order I signed July 7, 1992 that was entered as a result of a request made by Mr. Means for a hearing preliminary to the possible issuance of a show cause order. That request, in turn, was made by Mr. Means in response to a suggestion I made in an order signed July 1, 1992 that Mr. Means might make such a request in lieu of having me issue at that time a show cause order.

Okay. And present is Kelly Robbins, the attorney for the plaintiff in this case; Mr. Means; and Jonathan Kerr, who is the personal attorney for Mr. Means.

Is that correct?

MR. KERR: That is correct, Your Honor.

THE COURT: Okay. I notice Mr. Collins is in the audience. I invited him to be present, and I left it up to his judgment as to whether or not he would be here.

And I am pleased that you are present, Mr. Collins.

Is this Mr. Svede?

MR. SVEDE: Yes, sir.

THE COURT: Okay. Thank you for being present.

And, Mr. Brown, I appreciate you being present.

Claude Brown is here also.

[4] Mr. Kerr, I'm going to let you make a preliminary statement, but before you do let me kind of summarize where we are.

I set forth in my July 1, 1992 order in some detail the greatest concern I had in reference to representations that were made by Mr. Means to the court during the course of the hearings that were held in this case in late May and early June 1992. I put in some detail the exchanges that occurred between counsel and the court in reference to the matter of an accident log and also put in the order in some detail the events that led up to that exchange.

I'm not going into at this hearing other representations that I considered to have been questionable that were

made by Mr. Means at the hearings. I'm going to concentrate on the subject of the accident log, which appeared to be a rather flagrant case of misrepresentation by Mr. Means, as well as a rather flagrant violation of the discovery obligations.

Before I invite you to make a statement, Mr. Kerr, I would like to know if either you or Mr. Means has any disagreement with any of the factual statements that are contained in the order I signed on July 1, 1992?

MR. KERR: Your Honor, I haven't reviewed it with that in mind. Everything the court said from the transcripts and from the pleadings that are on file is accurately reflected. We disagree with the conclusion that there was a [5] misrepresentation, as the evidence will show. We have no problem with the specific facts.

THE COURT: Okay. That is what I was trying to find out, if there was anything factually set forth within the order that there is any disagreement with.

MR. KERR: No. Your Honor.

THE COURT: Okay. Why don't you at this time, Mr. Kerr, make whatever statement or explanation you want to make in behalf of Mr. Means, concentrating on the points that are made in my July 1, 1992 order?

MR. KERR: If it please the court, Your Honor.

We, too, have focused on the situation with the log which is shown as, I guess, Al Svede's log, for purposes of these hearings.

Your Honor, most of what we have to say is going to be from two witnesses: We are going to have Mr. Svede testify and then Mr. Means.

The first thing that the court needs to understand that I don't think Mr. Means made clear at the hearing on June the 4th is that there are, in fact, maintained at that postal complex out on Mark IV Road—I think it is called the Sectional Mailing Center off the big post office complex—but out at that complex there are actually two sets of logs. We have them in front of you here today. And one set of logs is maintained by the Safety Office.

We are going to have testimony on that. [6] That is maintained under the direction of Mr. Kunkel.

THE COURT: Mr. who?

MR. KERR: Kunkel. K U N K E L, I believe. He's present in the courtroom, Your Honor.

And there is a second set of logs, the ones that came into question at the June 4 hearing that were maintained by Mr. Svede, Al Svede, S V E D E.

There was some considerable confusion about which logs had been reviewed and what the contents of those logs were.

The testimony will be that Mr. Means did not know of the existence of the Al Svede log; that is, the one he told the court, both in pleadings and from this podium, that didn't exist. He didn't know they existed until an hour-and-a-half before the hearing on June 4 resumed at 2:00 p.m. That would be the uncontroverted testimory.

And, second, he didn't know about it—not through his own failure—he didn't know about it because of an error or misunderstanding and lack of communication and confusion regarding what was in these two different logs. He, in fact, had examined Mr. Kunkel's logs themselves and had been assured that those were the only logs applicable.

Mr. Means did not intentionally hide and conceal records and did not violate Rule 11 or Rule 13(2) of the local rules or the Dondi Properties decision because we'll maintain the evidence will show he made a reasonable effort; and, based on [7] his reasonable effort, he reached certain conclusions that he thought were true testimony, based on the information he had available to him.

We're going to prove all that, Your Honor. But before we do that I want to make one observation, just from reading the transcripts and the events that occurred surrounding the discovery in this case.

Mr. Means didn't intentionally withhold these documents and he wasn't negligent in not locating them, as we'll show in detail. And I don't need to bore the court or take the court's time with what the evidence is going

to be from the witness stand. But what I will say is that part of the problem, I think, in what Mr. Means told the court on June the 4th results from two things: One, from reading that transcript, it appears, with all due respect to Mr. Means, that at times he is constitutionally incapable of making a singular declaratory answer to a direct question from the court. I suffer from the same affliction. Call it lawyeritis or whatever you want to call it.

And you take that attribute, coupled with the fact that he had made a diligent search and been told these logs didn't exist, and, lo and behold, they appear.

He was in a situation that afternoon that, I guess, is the courtroom equivalent of a rabbit caught in headlights. And he made a statement to the court that the documents weren't [8] produced because they weren't within the call because they didn't fit any request for document production by the plaintiffs.

That was a poor argument. That was an argument he made, I think, in an attempt to protect his client because his activity at that point wasn't in question. I think he regrets that argument, but it doesn't make him a liar and it doesn't make him unskilled or incapable of practicing law in this court.

With that, Your Honor, unless the plaintiffs' counsel wants to have the opportunity to respond, we're ready to call our first witness.

THE COURT: Okay. Let me clarify a position.

Is it Mr. Means' position that at the time of the June 4 hearing when Mr. Svede testified that he was not aware that there was a log kept by Mr. Svede of accidents?

MR. KERR: He was aware—No, that is not his position. He was aware there was a log kept, but he thought the log he had looked at was Mr. Svede's log, and, in fact, it was Mr. Kunkel's log.

THE COURT: He knew before the hearing that there were two logs, one kept by Kunkel and one kept by Svede?

MR. KERR: No, he did not know prior to the hearing that there were two sets of logs. He did not know

that until Mr. Svede showed up with his own log in Mr. Means' office, at the U.S. Attorney's Office, an hour-and-a-half before the [9] hearing resumed at 2:00 o'clock.

THE COURT: An hour-and-a-half before what?

MR. KERR: Before the hearing resumed at 2:00 o'clock. The court issued an order at the break. Mr. Svede brought everything he had to the courthouse, and there was this second log Mr. Means hadn't seen and didn't know existed.

The COURT: And you are telling me that Mr. Means first knew of the existence of a log maintained by Mr. Svede during the noon hour on June 4?

MR. KERR: He knew that Mr. Svede maintained the log, Your Honor. He knew that. But it was his understanding that that log that Mr. Svede had access to —whether he maintained it or not—but the only log he knew existed was the log that Mr. Svede had given him and he had examined. He examined it on the 26th of May in Mr. Svede and Mr. Kunkel's presence. He thought that was the only log. Okay? And that's these books right here, Your Honor. He looked at those logs.

THE COURT: Okay. Go ahead and finish what you were saying.

MR. KERR: He determined that there was no reference to the Chilcutt case or any accident at River Bend in these sets of logs. These are Safety Office logs. Okay? He looked at those. He had been told about those on more than one occasion.

Then that's why he told the court there was no reference—

[10] THE COURT: Okay. I guess what I'm having a little trouble with: Are you telling me that until the noon recess on June 4 that Mr. Means thought there was only one log?

MR. KERR: That is absolutely right.

THE COURT: That is what I'm trying to find out.

MR. KERR: Yes, sir.

THE COURT: Whose log did he think it was? Who did he think maintained it?

MR. KERR: Mr. Kunkel.

THE COURT: Okay.

MR. KERR: The one that he had looked at he thought Mr. Kunkel maintained it because he saw it in Mr. Kunkel's office, and that is what he was told.

THE COURT: So he didn't think before the noon hour on June 4 that Mr. Svede maintained the log?

MR. KERR: That is correct.

THE COURT: That is what I am trying to find out.

MR. KERR: That is correct.

THE COURT: Okay. You may proceed.

MR. KERR: We'll call Al Svede at this time, Your Honor.

THE COURT: Okay. Come forward, Mr. Svede.

Mr. Svede, you were sworn at an earlier hearing in this case, and that sticks. You are still under oath.

THE WITNESS: Yes, sir.

[11] MR. KERR: Your Honor, does the court have what has been marked as Court Exhibit No. 1, which is the two pages from Mr. Svede's log?

THE COURT: Yes. Here it is.

MR. KERR: May I have those and approach the witness?

THE COURT: Yes.

AL SVEDE,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KERR:

Q. Would you tell us your name, please, sir?

A. Al Svede.

Q. And you are the accident investigator for the Mailing Sectional Center here in Fort Worth; is that correct?

A. Correct.

Q. And your office is out at the General Mail Facility, which is a complex on Mark IV Road or Boulevard, Parkway, north of downtown; is that correct?

A. Correct.

Q. And you have held the position of accident investigator six years?

A. Approximately six and a half years, yes, sir.

Q. And you investigated the claim filed by one of the plaintiffs in this case, Brenda Chilcutt; is that correct?

A. Yes, sir.

[12] Q. And after suit was filed by Ms. Chilcutt you worked with Mr. Randell Means to locate and assemble documents responsive to requests that had been made by the plaintiffs, Ms. Chilcutt; is that correct?

A. Correct.

Q. And did you start working with Mr. Means on that process sometime around April 20, April 22, sometime in that time frame?

A. Approximately, yes.

Q. And you testified in this courtroom on June the 4th; is that correct?

A. Yes, sir.

Q. And, Mr. Svede, you have in front of you what's been marked as Court Exhibit No. 1.

Would you tell us what that is, please sir?

A. It's a non-vehicle accident register.

Q. And is that a document that you kept yourself?

A. Yes, sir.

Q. And, Mr. Svede, when did you first show that document—or, to your knowledge, when did Mr. Means first see that document?

A. It was approximately noon on June the 4th, just prior to a hearing.

Q. When you brought it to Mr. Means' office?

A. Correct.

[13] Q. And the two pages that are marked as Court Exhibit No. 1 are actually two pages out of the entire

set of entries or logs that relate to a particular time period; is that right?

A. Yes, sir.

Q. And what time period is that?

A. Fiscal year 1989.

Q. All right, sir. And when you began working with Mr. Means in April up through the time when Mr. Means first saw that document on June 4, where was your non-vehicle accident report or your log kept?

A. It's kept in my office. We keep the current 3 years, present year and two years back, in a register book. Years prior to that we roll up and keep in a file cabinet.

Q. Physically, sir, where were those two pages that are in front of you during the time you were working with Mr. Means to collect and produce documents?

A. They were rolled up in the file cabinet in my office.

Q. Let me direct your attention to this stack of documents, if I could.

And "rolled up," you mean rolled up like this; is that correct?

A. Yes, sir.

MR. KERR: Your Honor, given the nature of this hearing and the nature of these documents, I don't want to mark them, but I'll just state Mr. Svede, for the record, has [14] identified these two rolled-up pieces of paper with rubber bands around them.

Q. (By Mr. Kerr) Isn't that how the log that you have in front of you, Exhibit 1, was kept in your filing cabinet during the time you were working with Mr. Means?

A. Correct.

Q. And this book that has non-vehicle accident log on it, a black notebook about an inch-and-a-half thick, was the one that was current that was kept inside your filing cabinet?

A. Correct.

Q. Now, Mr. Svede, do you have any knowledge whatsoever that Mr. Means saw or read those two pages

you have in front of you, the non-vehicle accident report, Court Exhibit No. 1, before you showed it to Mr. Means' on June 4, 1992, a little after noon in his office?

A. No.

Q. And prior to June 4 did you ever discuss the non-vehicle accident register with Mr. Means. Prior to June 4.

A. No, I did not.

Q. Now, just generally, Mr. Svede, as best you recall, how many occasions prior to June 4, the day of the hearing, did you meet face-to-face with Mr. Means out at the post office complex?

A. Three times, I believe.

Q. And on each of those occasions were you and Mr. Means both [15] working to collect documents that would be responsive or within what was called for by the plaintiffs' document request?

A. Yes, sir.

Q. And in addition to these face-to-face meetings, Mr. Svede, how many phone conversations did you have, approximately, with Mr. Means from the time you started working with him until the June 4 hearing?

A. Six or seven, I'm sure.

Q. And in how many of those discussions that you had with Mr. Means prior to June 4, whether it was face-to-face or on the phone, did the two of you review the various categories or items of documents requested by the plaintiffs?

A. I believe we did each time.

Q. And on each of these occasions did Mr. Means ask you to assist him in collecting documents from the post office and the post office employees that would be responsive to each of the categories that you went over?

A. Yes, sir.

Q. And did, in fact, he meet with other post office employees other than yourself?

A. Yes, sir.

Q. How do you know that he did that?

A. I was with him.

Q. And prior to June 4 in these telephone discussions or face-to-face meetings or meetings with other post office [16] employees where you were with him, did you ever specifically tell Mr. Means that your log in front of you, the non-vehicle accident register, Court Exhibit 1, might be called for by the requests for production of documents?

A. No, sir.

Q. Did you ever even tell him that you had it?

A. I don't specifically recall that, no.

Q. Now, you had discussed with Mr. Means, though, did you not, sir, sometime during the first half of May of 1992 this other set of logs that we have in the courtroom, which is on counsel table right here? Did you, sir?

A. Yes.

Q. So we'll have something to call those, those are the Safety Office logs; is that correct?

A. Correct.

Q. And those are maintained by Mr. Kunkel; is that correct?

A. Correct.

Q. I'm sorry. I forgot Mr. Kunkel's first name. For the record—

A. Bob.

Q. Bob Kunkel?

And when did you first tell Mr. Means, as best you can recall, about those Safety Office logs?

A. I can't recall the exact date that was—

Q. You recall the circumstances?

[17] A. Right. I believe that was initially brought out in my deposition about the logs.

Q. Right, sir.

And what did you tell Mr. Means about those Safety Office logs?

A. I can't recall exactly what was said. The subject was brought up, and I said that there are some logs kept in the Safety Office.

Q. All right, sir. You told Mr. Means there were some logs kept in the Safety Office?

A. Correct.

Q. And did you tell him that you would undertake to look at those logs or have someone do it to determine whether those logs referred to either the Chilcutt case or any other accident at River Bend post office?

A. Correct.

Q. And did you do that?

A. Yes, I did.

Q. Did you report back to Mr. Means?

A. Yes, I did.

Q. What did you tell him?

A. I told him there was no notation about the Chilcutt accident in any of the files or logs.

Q. And—

THE COURT: I'm sorry. What did you tell him?

[18] THE WITNESS: I told him there was no notation of the Chilcutt accident in any of his logs.

THE COURT: Any of whose logs?

THE WITNESS: Mr. Kunkel's.

THE COURT: That was in response to a request by Mr. Means for you to determine what?

THE WITNESS: Just to see if it was in his log books, to see if the Chilcutt accident was in his log books.

THE COURT: Is that a recording made of all the accidents that occurred on the post office premises?

THE WITNESS: Normally we do that, yes, sir. We both keep running logs and we both keep the same ones. This one, however, for some reason, missed the system.

THE COURT: Okay. Was your log book the only log book that had the Chilcutt accident reported in it?

THE WITNESS: Yes, sir.

THE COURT: And tell me—As well as you can, reconstruct it. What was the question posed to you by Mr. Means that caused you to inquire of Mr. Kunkel as to whether the Chilcutt accident was recorded in his log?

THE WITNESS: The best I recall Mr. Means asked me to check with Mr. Kunkel in his logbooks and see if the entry was there.

THE COURT: Had you not said anything at any time to Mr. Means about having a log book of your own in which [19] accidents were recorded?

THE WITNESS: I believe I brought up the log book in my deposition, but that's the only—

THE COURT: When was that given?

THE WITNESS: The exact date I don't recall. I am not sure of the exact date, Your Honor.

THE COURT: Okay. Sometime in April or May of 1992?

THE WITNESS: Yes, sir.

THE COURT: And did you during the deposition make known there were two different sets of logs, one that you maintained and one that Mr. Kunkel maintained?

THE WITNESS: I don't know if that was specifically brought out, but I did mention a log.

THE COURT: Did you mention the one that you maintained?

THE WITNESS: Yes, sir.

THE COURT: And was there any inquiry of Mr. Means of you as to whether the logs you maintained had reference in it to the Chilcutt accident?

THE WITNESS: No, sir.

THE COURT: You never inquired along that subject?

THE WITNESS: No, sir.

THE COURT: Okay. You can go on.

MR. KERR: If I could approach the witness, Your Honor, and show him the page from his deposition that was given [20] on April 22nd of 1992.

THE COURT: Okay.

Q. (By Mr. Kerr) Mr. Svede, let me hand you—

MR. KERR: Your Honor, do you have a copy of that?

THE COURT: I think you better start marking things as exhibits that are not already exhibits so we'll know what you are talking about.

MR. KERR: All right. We'll mark the deposition of Al Svede as Means Exhibit No. 2.

MR. KERR: Your Honor, do you have a copy of the deposition?

THE COURT: No.

While you are doing that, let me clarify one thing with Mr. Svede.

Did you ever tell Mr. Means that there was no record in your log of any complaint made by Ms. Chilcutt?

THE WITNESS: No, sir.

THE COURT: Did you ever tell Mr. Means that your log did not have an entry of some kind pertaining to Ms. Chilcutt's accident?

THE WITNESS: No, sir, I didn't.

THE COURT: Okay. Go ahead.

Q. (By Mr. Kerr) Mr. Svede, let me show you what has been marked as Defendant's Exhibit No. 2 and refer you to page 107 of your deposition that was given on April 22nd, 1992 and refer [21] you specifically to the question that begins on line 6 where you are asked:

> "Do you know of any claims having to do with slip and falls as a result of slippery floors with either the cause being excessive wax or some liquid on the floor that occurred in any other Fort Worth post office within two years prior to the date of this accident?"

And your answer:

> "None to my knowledge. I'm not saying there wasn't any; I just can't recall any."

And you believe that to be a true answer at the time, correct?

A. Correct.

Q. And then the question reads:

> "Where would such a record of other claims and lawsuits of that type be kept?"

And you answer:

> "The Safety Office would have anything that comes through like that."

Is that correct?

A. Yes, sir.

Q. And then the question is:

"That would be Mr. Kunkel?"

And your answer is:

"Yes."

[22] A. Yes.

Q. And then on page 114—

THE COURT: What was the last page you were looking at?

MR. KERR: It was all on 107, Your Honor.

THE COURT: Okay. I find it here. That is fine. Go on to 114.

Q. (By Mr. Kerr) Page 114 in this entire deposition is your only reference to your log, on line 16 of page 114.

In response to the question:

> "Do you have any data or any information about how many claims are denied that you investigate?"

you say,

> "It's in the reports—I mean in my log. And if there are claims filed, I have records. I believe retention time there is 3 years on those."

A. Correct.

Q. That's the only reference you have ever made prior to June 4 to Mr. Means or in Mr. Means' presence about your log?

A. Yes.

Q. Now, Mr. Kunkel—When you discussed with Mr. Means the Safety Office logs, the ones kept by Mr. Kunkel, you did that on more than one occasion, didn't you?

A. I can't recall the number of times.

Q. Well, it was—

[23] A. More than once.

Q. All right, sir.

And the question that the court asked you about earlier where you were asked what you did or what Mr. Means asked you specifically about Mr. Kunkel's logs, that wasn't the only time Mr. Means asked you to look for documents generally that might be relevant; is that correct?

A. Could you repeat that? I didn't get part of it.

Q. Yes. It was a garbled question.

You looked for documents at Mr. Means' request on at least three or four occasions, did you not, sir?

A. Correct.

Q. And Mr. Means discussed with you Mr. Kunkel's log on three occasions; is that correct, sir?

A. Correct.

Q. And when Mr. Means asked you about logs, did he tell you that he was specifically wanting to look at Mr. Kunkel's logs, or was it in the context of trying to gather information that was generally responsive to what the plaintiffs had asked for?

A. He asked on several occasions about Kunkel's logs, and he also asked about any documentation pertinent to the case.

Q. And, in fact, after you had told him that Mr. Kunkel's logs contained no reference to the Chilcutt accident or to River Bend, he asked you to arrange a meeting so he could look at the Safety Office logs; is that correct?

[24] A. Correct.

Q. And you did that with him, didn't you?

A. Yes, sir.

Q. And that was on or about May 26th, which would have been the Tuesday before the hearing on sanctions that occurred on Thursday; is that correct?

A. Correct.

THE COURT: Mr. Kerr, let me ask a question.

You said that Mr. Means asked you about any document pertinent to the case?

THE WITNESS: He did. He would go down the list. He had the requests for production. He would go down the list asking for the different documentation.

THE COURT: Okay. When he asked for any document pertinent to the case, did you not disclose at all with him that you had a log that recorded the accident, as well as other accidents?

THE WITNESS: Your Honor, the log never came to—My log never came to mind, basically, because the page that referred to the Chilcutt accident was in the file cabinet in the back. I had the case file out working on it.

The only reason I have the log and the use for it as an index or cross-reference, just to find numbers.

THE COURT: My question was: When Mr. Means asked you for documents pertaining to the accident, including documents [25] that disclosed any accidents at River—

What is it, River Bend?

THE WITNESS: River Bend, yes, sir.

THE COURT: At the River Bend facility.

Did he ask that kind of question?

THE WITNESS: I can't remember if that was the exact wording, but as we went down that was—

THE COURT: On those subjects, did he ask you questions of that kind?

THE WITNESS: About the log?

THE COURT: No. Any documents that might exist pertaining to any accident that happened at the River Bend facility, for example.

THE WITNESS: Yes, he did ask that question.

THE COURT: Including the Chilcutt accident?

THE WITNESS: Yes, sir.

THE COURT: And you're saying that you didn't even mention to him that you had a log when he said that?

THE WITNESS: It just didn't come to mind, sir.

THE COURT: You are saying you didn't mention to him that you had a log when he said that?

THE WITNESS: No, sir, I did not.

THE COURT: Okay.

Q. (By Mr. Kerr) Why did you not do that, Mr. Svede?

A. It just didn't come to mind that the log would be—I just [26] didn't have any idea that the—I had been—several times I have been working with the U.S. Attorney's Office on cases, and I have never gone this far, you know, through trial. And in all other requests for production or anything the log book or register has never come up.

So it just didn't cross my mind that would be something that would be, you know, requested. It just didn't come to mind.

Q. All right, sir. And when you were looking through Mr. Kunkel's logs, the Safety Office logs, you were there with Mr. Means?

A. Yes, sir.

Q. Did Mr. Means actually look through part of Mr. Kunkel's office's logs himself? Is that correct?

A. Yes, sir.

Q. And then Mr. Kunkel took Mr. Means and you to a storage room, and you completed or you began looking at logs that were in storage in a filing cabinet, correct, sir?

A. Yes, sir.

Q. And Mr. Kunkel did not find anything in those Safety Office logs regarding the Chilcutt case or River Bend post office?

A. No, sir.

Q. And did Mr. Means ask him at the end of the day to keep looking for those logs?

A. Yes, sir.

[27] THE COURT: Mr. Kerr, if the examination is to have a whole lot of meaning, you really need to let the witness give testimony, rather than you.

MR. KERR: All right, sir.

Q. (By Mr. Kerr) Tell us what went on in that storage room while the three of you all were looking for logs in Mr. Kunkel's safety office.

A. Basically Mr. Means and I stood over to the side while Mr. Kunkel went through the different boxes that he retained and said that he couldn't find anything.

And Mr. Means asked him if he would continue looking.

And I don't know the exact time we were in the storage room. Maybe 10 to 15 minutes.

Q. And during that day about how many people had Mr. Means met with? That means how many post office employees did you arrange for Mr. Means to meet with. Do you recall?

A. Approximately five.

Q. And then you understood that Mr. Means had already met with several others at the River Bend facility before he got to your office at 9:00 or 10:00 that morning; is that right?

A. I believe so, yes.

Q. And after you left the postal complex that day, did you speak with Mr. Means the next morning on May 27th about the documents?

A. I believe so.

[28] Q. If that was the day that you met Mr. Means at the River Bend post office and then produced the documents, do you recall any discussions with him that day?

A. I am not sure of the dates, no, sir. I can't recall.

Q. Do you remember the day you met Mr. Means at the River Bend post office after you had reviewed all of these records and then produced the additional reports to the plaintiffs?

A. Yes.

Q. And during the discussion in Mr. Kunkel's office about the logs and then the next day when you met Mr. Means there was nothing mentioned about your log.

THE COURT: Mr. Kerr, it really would be more meaningful if the witness testified rather than you.

MR. KERR: I'm sorry.

Q. (By Mr. Kerr) Did you say anything about your log on either of those occasions?

A. No, sir, I did not.

Q. Based on every contact that you had, any and all information that you had about your dealings with Mr. Means from April through the June 4 hearing, do you, sir, have any reason whatsoever to believe that Randell Means knew about the non-vehicle accident register, Court Exhibit No. 1, prior to June 4 and intentionally withheld it or tried to conceal it from production to the plaintiffs?

A. No, sir, he did not.

[29] Q. And based upon any and all of your dealings with Mr. Means through this same time period, April through June 4 of 1992, do you have any reason to believe that Randell Means refused to produce or kept that Exhibit No. 1 back because he felt that it was not responsive to what the plaintiffs had asked for?

A. No, sir. He went over and above what normal would be, I think.

Q. What do you mean by that, sir?

A. Just an extra effort. We went together looking for information and asking people if there is any other documentation. He just—I think he put an extra effort into trying to provide everything that was asked for.

MR. KERR: That's all I have, Your Honor. Pass the witness.

THE COURT: Okay. Ms. Robbins, because of your familiarity with the case as it has developed, I am going to invite you to ask any questions of the witness you might need to ask him that would clarify anything that we are dealing with.

MS. ROBBINS: I will just go through these in order. I took a few notes.

CROSS EXAMINATION

BY MS. ROBBINS:

Q. Mr. Svede, you stated April 22nd was the first time you started working on assisting Mr. Means with production of these [30] documents?

A. I can't remember the exact date.

Q. Okay. Approximately sometime in April?

A. Yes.

Q. Okay. A moment ago you were discussing some excerpts from your deposition. And I don't have the deposition in front of me, so you may need to help refresh my memory on it. But it was my recollection that I was asking you, in addition to those two examples of where you discussed the accident log about—As we went through the subpoena duces tecum, which is pretty much similar to the requests for production, we went through each one of those item by item. And, as I recall, you stated in response to one of those that you kept an accident log of your own, and that was responsive to, I believe, my request for documents having to do with the investigation of the Chilcutt matter.

Do you recall the context that I am talking about in the deposition?

A. Not offhand.

MR. KERR: Objection, Your Honor.

Actually, what he said is in the record; and, if she's going to ask him about it, I would ask her to refer to the deposition itself.

THE COURT: I overrule your objection. If you want to refer to the deposition, refer to the deposition. You can [31] refer to the exhibit.

MS. ROBBINS: Well, I don't want to take up the court's time right now looking at it. I was just asking Mr. Svede—

THE COURT: Okay. If during the course of the hearing you have time to thumb through the exhibit and find what you are talking about, that might be helpful.

MS. ROBBINS: Yes, sir.

I'll wait until I can do that before I proceed with that question.

Q. By Ms. Robbins) Mr. Svede, do you and Mr. Kunkel both office at the Management Sectional Facility?

A. We're both in the same area but not in the same building.

Q. What is the purpose of having two separate logs rather than one central log?

A. My log is basically kept for the tort claim activity. Mr. Kunkel's logs are kept for safety reasons.

Q. Is there any kind of rules or policies—For example, you mentioned a moment ago that apparently this one missed the system?

A. Yes.

Q. What is the procedure, as far as what you are required to do, in order to maintain the information; and then how does that compare with what Mr. Kunkel is required to do to maintain his log?

[32] A. Well, I can only speak for my log. I am not in the safety department, but basically my job is to investigate the claims and make recommendations on them and send them forward.

Like I say, I can't speak for Mr. Kunkel.

Q. What is it specifically—or if there are any specific written policies or verbal policies—that you operate under as far as—if you can give the steps of what you are supposed to do with respect to filling out your accident log?

A. Mr. Kunkel and I have a verbal agreement that if an accident is called in, we will—if it is called in, he'll notify me; and, if it is called in to me, I will notify him. The paperwork that is sent in, we'll send the information to each other.

In this particular case I don't know what happened. It may be based on the fact that the accident happened on one occasion and it was not reported to me until two weeks later. That could have some bearing on it. I am not sure.

Q. Since this matter came to light about the accident log at the June 4th hearing, have you had a chance to discuss with Mr. Kunkel how this accident missed the system, so to speak, as far as landing in his log?

A. We have talked about it, and he said it was just a foul-up in the system.

Q. You said the purpose of keeping your log was to record information for possible tort claims; is that correct?

[33] A. Correct.

Q. All right. And what is the purpose of Mr. Kunkel's log?

THE COURT: I think he has already said that. For safety reasons.

Is there something else you are getting at?

MS. ROBBINS: I guess I didn't get his answer.

Q. (By MrMs. Robbins) Is it something broader than your—

THE COURT: I thought you said earlier it was for safety reasons.

THE WITNESS: Correct. Yes, sir.

THE COURT: Okay. I guess she is now wanting to know what you mean by that.

THE WITNESS: He is the safety officer for the Fort Worth MSC and, therefore, anything that is safety related he keeps track of that.

Q. (By Ms. Robbins) All right. And, Mr. Svede, to clarify a statement you said a minute ago about the physical process of looking through Mr. Kunkel's accident log, I believe you said you and Mr. Means stood to the side and Mr. Kunkel went through the documents?

A. Correct.

Q. Okay. Do you know if Mr. Means actually sat down and looked through the same log that Mr. Kunkel reviewed?

A. Prior to going to the storage room Mr. Means looked through Mr. Kunkel's log in his office.

[34] Q. Mr. Kerr's question a moment ago which you responded to said that Mr. Means reviewed part of Mr. Kunkel's log.

Do you know what the part that was; and, if so, why the whole log was not reviewed?

A. That I do not know.

THE COURT: Is what is referred to as Mr. Kunkel's log available in the courtroom?

MR. KERR: It is right here, Your Honor. It is the Safety Office log.

THE COURT: Could I see that?

MS. ROBBINS: Your Honor, that's all the questions I have at this time.

THE COURT: Okay.

MS. ROBBINS: For the record, I would like to point out that your order—I believe it was the July 1st order—said that the accident log which Mr. Svede produced at the June 4th hearing was not received by plaintiffs' counsel until that day. But I still haven't seen the log, just for the record. And I don't know if it is the court's intention to have it disclosed to us or even if it is necessary. But just to clarify.

THE COURT: You mean you haven't seen the exhibit?

MS. ROBBINS: Right.

THE COURT: The Court's Exhibit 1?

MS. ROBBINS: Right.

[35] MR. KERR: I have it here, Your Honor.

THE COURT: Well, okay. That's fine. I didn't mean to imply that you had seen it on that day, but I assumed you had since it was now a public record as a court's exhibit.

Let me see what you are referring to as Kunkel's logs.

MR. KERR: Your Honor, now that you have the set of logs I think I can shortcut matters.

The long gray binder is the one that contains the time period for the Chilcutt accident.

THE COURT: Well, I am not going to study them. I just want to see the form they take.

There are a number of pages that generally are the same size and structure of the Court's Exhibit No. 1. And then there is a book that appears to have something in it, and I am not going to take time to go through that.

EXAMINATION

BY THE COURT:

Q. Mr. Svede, when did you first remember that you had this Court's Exhibit No. 1 log?

A. It wasn't—It wasn't forgetting about it. The first time it was brought up was the morning of June 4th when Mr. Means' secretary called and said that we were scheduled in court at 2:00 p.m. that afternoon.

And I can't recall if this secretary mentioned it. I believe just a short time later Mr. Means called, 30 to 45 [36] minutes later, and he said bring your logs, Kunkel's logs and everything else you have in the case. Bring it with you to my office. That was the first time Mr. Means mentioned the log and the first time the log just came to light.

Q. The first time Mr. Means had ever asked to see your log?

A. Yes, sir.

Q. That is the first time you had had any discussion with Mr. Means about your log? And I'm talking about this Court's Exhibit 1. Is that the first time you ever had any discussion with him about it?

A. Yes, sir.

Q. Now, you say that you had not forgotten it earlier. Maybe I misunderstood.

When you were asked questions by Mr. Means in April or whatever it was when he was seeking to obtain information about Ms. Chillcut's accident, did you forget at that time that you had a log that recorded her accident?

A. Well, I used the log on a daily basis. Like I said, it is a cross-reference.

Q. Did you forget at that time that you had the log recording her accident; that is, that her accident was reported in the log?

A. I really didn't have to have the log to look up her accident since I was working the case, anyway, and the case file was out. That is the only reason I use the log book, is [37] to look up the file number.

Q. Maybe you can help me again on something I apparently misunderstood earlier.

When Mr. Means was seeking information about Ms. Chilcutt's accident, why did you not at that time show him your accident log?

A. It just didn't come to mind.

Q. So you forget about it?

A. Yes, sir.

Q. That is what I thought you said.

When did it first come to your mind that Ms. Chilcutt's accident was recorded in that log?

A. At the phone call from Mr. Means on June 4.

THE COURT: Okay. You can step down. I would like for you to stay until the hearing is concluded, in case anybody else wants to ask you a question.

MR. KERR: We will call Mr. Means at this time, Your Honor.

THE COURT: Okay.

Let's see. I don't believe Mr. Means has been sworn.

(Witness sworn by the court.)

THE COURT: Okay.

RANDELL MEANS,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

[38] BY MR. KERR:

Q. State your name, please, sir.

A. Randell Means.

Q. Mr. Means, when were you licensed to practice law?

A. November the 12th, 1979.

Q. Mr. Means, how long have you been actively practicing in the courts in the Northern District of Texas?

A. Since I joined the U.S. Attorney's Office in January of 1987. I believe I was technically admitted to the district prior to that.

Q. Now, Mr. Means, based on what you know sitting in the witness stand today, how many different logs or sets of logs were maintained out at the post office complex on the north side in April and May of 1992?

A. There are two different sets.

Q. When did you first learn about the set that was kept in the Safety Office?

A. During the deposition of Al Svede when he referred to it in response to some questions from the plaintiffs' lawyer.

Q. And, sir, what discussion after that deposition did you have with Mr. Svede about the Safety Office logs?

A. I requested him to check the logs to see if there was any reports of any accident on the premises at the River Bend post office.

Q. And what did he tell you?

[39] A. Afterwards, after that, he later told me that those logs had been checked and that there was no report of any accident on the premises, anything to do with the premises or any complaint at all in terms of an accident at River Bend.

Q. Mr. Means, how many discussions did you have with Mr. Kunkel, approximately, about producing documents responsive to the specific requests the plaintiffs made?

A. You said Kunkel.

Do you—

Q. I mean Mr. Svede. I am sorry.

A. All right.

Including telephone calls, 10 or more. I know that we talked face-to-face before his deposition. We met after that a second time. I know we met face-to-face, I guess, three or four times.

Q. So the answer to my question is 12 to 14 conversations?

A. Yes, sir.

Q. And you didn't find out or didn't see—either one, both—didn't find out about it and didn't see Exhibit No.

1, Court Exhibit No. 1, until shortly after noon on June 24; is that correct?

A. On June the 4th.

Q. June the 4th. I'm sorry.

Is that correct?

A. Yes, sir.

[40] THE COURT: Again, it might be helpful if you let witnesses testify, rather than you testify.

Q. (By Mr. Kerr) Had you ever discussed the—What discussions had you had, Mr. Means, about that accident log with Mr. Kunkel or with Mr. Svede?

THE COURT: Which accident log are you referring to now?

MR. KERR: Court's Exhibit No. 1.

THE COURT: Okay.

Q. (By Mr. Kerr) What discussions did you have with Mr. Svede prior to June 4 about that log?

A. I had never had any discussion with him prior to that day about this log because I didn't know he had this document. I had had discussions with him about the accident logs that the post office had over and over.

THE COURT: Which one are you referring to, the one Mr. Kunkel had?

THE WITNESS: The ones that we now refer to as Kunkel, yes, sir. I thought that is all there was.

MR. KERR: Your Honor, if I could hand up a chronology that we put together just as an aid to the court.

THE COURT: Okay. Let me be sure I understand what you are saying.

Until noon on June 4, sometime during the noon hour, you thought the only log the post office kept relative to accidents [41] was the log that Mr. Kunkel kept?

THE WITNESS: Yes, sir. It was in that Safety Office, yes, sir.

THE COURT: And you had no idea before that time; that is, during the noon hour on June the 4th, that Mr. Svede might have an accident log that he kept?

THE WITNESS: No, sir, I did not.

THE COURT: Okay. Do you want to hand something to me?

MR. KERR: Yes, I do, Your Honor.

THE COURT: Why don't you mark that as an exhibit?

Do you have an extra copy you can mark?

MR. KERR: I do.

THE COURT: Why don't you mark it as--What designation are you giving the exhibits?

MR. KERR: I was calling them Means exhibits.

THE COURT: Okay. This will be Means Exhibit 2?

THE WITNESS: I believe 2 was used a minute ago, Your Honor. I'm sorry.

THE COURT: Okay. This will be 3, then?

MR. KERR: This will be 3.

THE COURT: Were you present when Mr. Svede gave his deposition? I haven't looked at the—

THE WITNESS: Yes, sir.

THE COURT: Okay.

[42] Q. (By Mr. Kerr) Mr. Means, you are aware that the plaintiffs filed their motions for sanctions and to compel production on May 19th; is that right?

A. Yes, sir.

Q. What did you do in response to that motion for sanctions?

A. I reviewed it and prepared a brief response that was filed on May the 22nd.

Q. Did you give them any more documents?

A. There were—Yes, sir. I finished some more collection of documents that we had been trying to work on since the deposition, and those were produced, as well, on May the 22nd at a conference that we had there at the U.S. Attorney's Office with the plaintiff.

Q. The answer is yes, correct?

A. Yes, sir.

Q. Did you produce Al Svede's log?

A. No, sir.

Q. Why not?

A. I did not know there was one.

Q. Now, Mr. Means, Mr. Svede had testified on page 114 of his deposition—or he had made a reference to "my log." It's page 114 of Means Exhibit No. 2. Is that correct?

A. Yes, sir.

Q. And you have read that deposition?

A. Yes, sir, at some point. I am not certain when.

[43] Q. And why, in view of Mr. Svede's comment about his log, were you not aware that Mr. Svede or did not think that Mr. Svede had a log that was separate from these Safety Office logs that we have in the courtroom?

A. At the point of the deposition I just didn't understand him referring to anything different than the further safety logs he explained in more detail in the deposition.

And then along with that I talked to him over and over about safety logs and checking logs, and all we ever talked about and all he ever told me about was the logs in the Safety Office. So that's all I thought there was.

Q. Okay. In view of your conversations with him, his reference to "my log" in his deposition, what did you think that meant?

A. I thought he was talking about the log of the post office as an entity, and that was the one that was kept in the Safety Office that he had access to.

Q. And then on May 22nd the court heard the motion for sanctions and to compel production of documents. Of course, you were here and understood at the end of that time or the end of that hearing that the court had ordered you to try to find any and all documents that could possibly be responsive and to submit some sort of verification about your efforts in that regard and what you could and couldn't find and what you produced; is that correct?

[44] A. Yes, sir.

Q. What did you understand to be the primary complaints or omissions as discussed in that hearing on May 22nd?

A. Plaintiffs' counsel was primarily complaining about whether or not we had produced everything about the

complaint system or the complaint procedure they had through the post office which dealt with these complaint cards that the system used for customer complaints, and she was—

Q. Just briefly, Mr. Means, so we don't repeat things.

A. I'm sorry.

And any documents that went along with that, any sort of internal correspondence the post office had in relation to any complaints like that.

Q. What else?

A. A log for the accidents for each individual post office unit.

Q. Let me stop you right there.

What had you told the plaintiffs about their prior request and the request this day for logs for each post office unit?

A. That there is not a log kept for each individual post office location, like the River Bend premises does not have its own separate log.

Q. And are you absolutely sure that is correct?

A. Yes, sir. That is everything I have been told even to this day.

[45] Q. And you also, did you not, discussed—Well, what else did she ask you about in that hearing?

A. She reiterated the request she made during the deposition about Svede's information on other slip-and-fall accidents that he had. So we were to produce the 495's, which is the claim made, and the postal responses to that.

Q. Was there any specific question about producing Al Svede's log, as opposed to other logs that you had already reported on?

A. No, sir. She only made the point about—was consistent she thought there was a log for each physical location or facility.

Q. What did you do after the hearing, Mr. Means, to comply with the court's order?

A. After I left the court I first called Al Svede at his office.

Q. What did you tell him?

A. I explained to him the hearing that had taken place, the court's orders. And we then began there on the phone. I walked him through line-by-line the production requests, and we went over that again.

Q. How many times had you gone over that previous to the conversation you had with him that day?

A. I had gone over the documents and things that the plaintiffs wanted at least twice in person prior to then and probably various discussions about different bits and pieces on [46] the telephone.

Q. So the answer to my question is two or three times?

A. Yes, sir, at least.

Q. Mr. Means, in that conversation with Mr. Svede on the 22nd, what else did you say to him, briefly?

A. That I needed to come to the post office and try to deal with all of these people directly just to emphasize what I understood from the court and go over those production requests to explore and make sure we didn't miss anything, and that I was going to have to verify and certify to the court what I had done to locate these records. So that I needed to be involved and do that, and he was going to arrange these meetings for me.

Q. Meet with what people, post office employees?

A. Yes, sir, employees at the main post office with responsibility in the various areas that were covered by the production requests.

Q. Including Mr. Kunkel?

A. Yes, sir.

Q. And why did you ask to meet with Mr. Kunkel?

A. Because I wanted to verify and reconfirm the issue about the safety logs and whether or not there was anything that had been overlooked in any of these records that they had told me they had looked at before.

Q. In this conversation, as well as the prior conversations when you were asking Mr. Svede about the logs, how did you [47] phrase that question?

A. I was talking about we needed to look at the accident logs.

Q. Did you say "Mr. Kunkel's logs"? Could you have said that?

A. I probably did, since I believe at that point—or I could have—since I believed by then I knew they were in his office.

Q. And you worked over the weekend, is that correct, sir, and then started interviewing post office employees on Tuesday?

A. Yes, sir.

THE COURT: Let me be sure I understand what you are saying.

You never asked Mr. Svede what his log might show?

THE WITNESS: No, sir.

THE COURT: Because you say you didn't even know he had a log?

THE WITNESS: That is correct.

THE COURT: Okay.

Q. (By Mr. Kerr) Mr. Means, what did you start with in your interview process on Tuesday, the 26th?

A. The first interview was Mr. Svede where we did the face-to-face—What we did on the phone was we started that again and went down the production list.

Q. What did you tell Mr. Svede in that conversation?

A. I again emphasized to him the court hearing, that the court was not happy. We needed to make sure we didn't miss anything.

[48] I also explained to him what the plaintiff had indicated—that she was insisting there were documents that had been created we had not produced. And I explained that to him to emphasize that and to make sure that—I pointed that out to him to see if there was anything that we hadn't shown.

Q. Did you arrange to meet with other people?

A. Yes, sir. That was already planned.

Q. Did you do that, meet with other people?

A. Yes, sir.

Q. Did you meet with Mr. Kunkel in the Safety Office?

A. Yes, sir, later that morning.

Q. Tell the court what you did in that office.

A. First with Mr. Kunkel and Mr. Svede we went over production requests that might be any documents that Kunkel would be aware of for safety-related investigation issues, and he helped us and looked at all possible publications he could think of that he had, was aware of, and he provided me some books. And then we moved on to the logs.

Q. What did you do with regard to the logs that day?

A. I believe we first went to the storage room and started looking at the logs that were stored there in his file cabinets. It was a very tight space, and I stood behind him.

Then at some point we broke from that and went back to his office.

Q. Okay. Let me ask you: When you were in the storeroom why [49] was he looking at the logs rather than you looking at the logs?

A. Because it was his records, he knew what to look at, and there physically wasn't space for me to stand behind him and do it.

Q. How far away from him were you?

A. Probably three feet directly behind him.

Q. What did you talk about while you were in the storeroom?

A. What he was looking at.

Q. What was he looking for?

A. He was looking at the zip code for the individual complaints on each line to try to identify where they were. We were talking about the possibilities of mistakes in the zip code notation.

So he was looking at different ways that the zip code numbers could be transposed. and anything that was close he would stop and look at the full reference to see if it was the address of the location.

Q. All right, sir. When you finished in the storeroom and went back to his office, had you found anything about River Bend or Chilcutt?

A. No, sir, not a thing.

Q. What did you do when you went back to his office?

A. He had a separate second book that I understood was strictly employees, and I stood over his shoulder with him and looked down that list to see if there was any employee-type [50] complaints or accidents or reports for the River Bend location. And we did the same thing in looking at zip codes and addresses.

Q. How did you leave it with Mr. Svede that day and Mr. Kunkel with regard to the logs?

A. It was late in the day, and Mr. Svede was going to—excuse me—Mr. Kunkel was going to go back and complete the storeroom examination of the logs and would either finish it that afternoon or early the next morning and report to Mr. Svede.

Q. At any time during that day when Mr. Svede was with you in Mr. Kunkel's office looking at those records did Mr. Svede ever mention his log, the pages of which have been marked as Court's Exhibit No. 1?

A. No, sir.

Q. Did you ask him?

A. No, sir.

Q. Why did you not ask him?

A. I didn't know to ask. I thought—

Q. Mr. Means, he mentioned it in his deposition. Why didn't you ask him?

A. That reference that he made in his deposition that I have now gone back and looked at did not register on me at the time during the deposition as being anything different or separate from the safety logs in the Safety Office. I just did not [51] understand or focus on him having something separate by that reference.

Q. And then the next morning on the 27th, Mr. Means, did you talk to Mr. Svede?

A. Yes, sir.

Q. What did he tell you?

A. He advised that Kunkel had finished the checking and that he had checked everything that there was and that there was no report at all for any accident at River Bend. And it was the day before while I was there personally that we verified that during the time period of the Chilcutt incident that it didn't even show up in the records.

Q. And then did you meet with Mr. Svede that morning?

A. Yes, sir.

Q. What did you do in that meeting?

A. I believe I met him also that morning at the main post office, and we checked with a couple other folks, did some last-minute double checking on documents. And then I met with him later in the afternoon at the River Bend location to travel to the plaintiffs' office for the production.

Q. And that meeting was on Wednesday, May 27th?

A. Yes, sir.

Q. And that same afternoon of Wednesday, May 27th, you filed what you called your affidavit of compliance verifying to the court the search you made and the results of your search; is [52] that right, sir?

A. Yes, sir.

Q. Mr. Means, to the best of your knowledge, information and belief, at the time you submitted your response to the requests for production of documents and your two affidavits of compliance, did you believe that those statements in those pleadings were true and correct in every respect?

A. Yes, sir, I did.

Q. And was that representation based on knowledge, information and belief from the inquiry that you had made—

THE COURT: Why don't you left [sic] the witness testify?

MR. KERR: I'm sorry.

Q. (By Mr. Kerr) Mr. Means, why did you make the statements to the court in those pleadings that you made, that there was no log that was responsive?

A. Because we had checked those logs. I had participated and asked him over and over about any records we had. And in all of the searching he and I had done together in going through those specific logs, the only logs there were, the verification was that there was no information in there that was responsive.

So there was nothing to produce, and I reported what I believed to be true based on all the checking I had done.

Q. Mr. Means, would you have produced Court's Exhibit No. 1, had Mr. Svede shown that to you or mentioned it to you in any of your conversations or discussions?

[53] A. I think so, yes, sir. I can't see—

Q. I'm sorry?

A. I can't see any reason why it could not be produced.

Q. On Monday, June the 1st, the plaintiffs filed their supplemental motion for sanctions.

Is that your recollection?

A. Yes, sir, that is right.

Q. Did you read that supplemental motion for sanctions?

A. Yes, sir.

Q. Now, did you see the specific comments in the supplemental motion regarding Mr. Svede's log?

A. Yes, sir.

Q. And, again, did you file a response to the supplemental motion for sanctions?

A. Yes, sir, I did.

Q. And, again, what did you tell the court and why about Mr. Svede's log?

A. I referred again that the logs had been checked, and I cited back to other areas in the record. I believe the language I used was reiterating or referring to the

checking that had been done of the logs and the verification that there was no entry in there that was responsive. And that as a result of that there was nothing to produce and, therefore, no violation of any discovery order.

Q. But on what basis did you make those representations to the [54] court?

A. Based upon all the checking I had done with Mr. Svede and all of the conversations I had had with him and Mr. Kunkel and everybody else at the post office, going through all of these records and asking for whatever we had.

Q. Now, it turns out you, of course, were wrong about whether Mr. Svede had a log or not.

You understand that, Mr. Means?

A. Yes, sir.

Q. When did you realize your error?

A. When he brought it to my office the afternoon of June the 4th.

Q. Now, prior to June 4th, did you intentionally withhold or conceal the production of those pages that are marked Court's Exhibit No. 1?

A. Never, no, sir, I did not.

Q. Did you ever discuss with anyone, anyone, that those pages needed to be withheld because they were not responsive to what the plaintiffs had called for?

A. No, sir, I didn't discuss them at all.

MR. KERR: I will pass the witness.

THE COURT: Let me ask you a few questions, and then I am going to let Ms. Robbins ask some questions, if she would like.

EXAMINATION

[55] BY THE COURT:

Q. Let me get the sequence of events in my mind.

Mr. Means, after the May 22 hearing you made inquiry to develop documents of a kind that you were to produce or your client was to produce pursuant to the requests for production?

A. Yes, sir.

Q. And in response to, for example, item 28 of the requests for production—First of all, you do recognize that item 28 of the requests for production calls for, among other things, the accident log Mr. Svede kept?

A. I recognize that now, yes, sir.

Q. Okay. Your response to that request was that no such thing exists. Is that correct, "There are none"?

A. Yes, sir, I believe that is right.

Q. And then, in keeping with my order that you verify the things you did to determine the accuracy of your response, you gave a declaration—

A. Yes, sir.

Q. Let me see if I can find that.

—called an affidavit of compliance.

And then the verification related to request No. 28, you repeated, "There are none"?

A. Yes, sir, in the affidavit of compliance.

Q. And then as your contact, the person from whom you gained the information that there were none, "You said the same as No. [56] 27 above"?

A. Yes, sir.

Q. And then No. 27 above gave as your contact Al Svede, accident investigator?

A. Yes, sir. That was one of the contacts.

Q. And you made that declaration under penalty of perjury?

A. Yes, sir.

Q. And then the supplemental motion for sanctions we filed by the plaintiff on June 1, 1992?

A. Yes, sir.

Q. And on page 11 of that, one of the complaints the plaintiff made was, "Additionally, Al Svede testified in his deposition (at page 108, line 6) that Mr. Kunkel has a log that keeps all accidents, vehicular and non-vehicular. Defendant has never produced this log."

Do you see what I'm talking about?

A. You said Kunkel there.

Q. Yes. On page 11 of the supplemental motion for sanctions.

A. Oh, I'm sorry. The motion.

MR. KERR: Your Honor, if I may hand that up.

MR. MEANS: I have it.

Q. (By the Court) The first paragraph that starts with the word "additionally."

Do you see that paragraph?

A. Yes, sir. Yes, sir.

[57] Q. It says, "Additionally, Mr. Svede testified in his deposition (at page 108, line 6) that Mr. Kunkel has a log that keeps all accidents, vehicular and non-vehicular. Defendant has never produced this log."

Do you see that?

A. Yes, sir.

Q. And then the very next paragraph is, "Additionally, Al Svede testified in his deposition (at page 114, line 16) that he keeps a log, which, among other things, would contain information relating to types of claims and their disposition. Defendant has never produced this log."

Do you see that?

A. Yes, sir.

Q. Now, that was in a document that you received from the attorney for the plaintiffs on June 1, 1992?

A. Yes, sir. I believe that's when I got it.

Q. You clearly understood at that time that there were two different logs, didn't you, one that Al Svede kept, which he had mentioned on his deposition as a separate log, and the one that Mr. Kunkel kept?

A. No, sir.

Q. You didn't understand those words?

A. I understand the words of what plaintiff was saying. I understood that is what she thought.

Q. But you didn't think Mr. Svede kept his own log?

[58] A. No, sir.

Q. Okay. Let's go to your response to that plaintiffs' supplemental motion.

You filed a response to that on June 3, 1992?

A. Yes, sir.

Q. Okay. Why don't you refer to page 23, approximately the middle of the page? This is directed to the complaints the plaintiff had made about failure to produce logs.

It says, "Plaintiff further complains of the failure to produce the accident log maintained by Robert Kunkel that relates to complaints or communications from customers in regard to the condition of the River Bend Post Office as a possible accident cause since 1978. As cited above herein in response to Request No. 13, the log maintained contains information from the years 1987 through the present, and no other log record exists for any other time periods. In accordance with the request for this accident log, which was expressly limited by plaintiff to any reports of accidents strictly dealing with the River Bend Post Office and something having to do with the floor, whether in public or employee areas, as fully set out above in response No. 13, Robert Kunkel, Safety Manager, Fort Worth, MSC USPS, conducted a search of the complete logs for both employee and customer complaints and found none to exist. As noted above herein, defendant failed to describe the details of this log search in [59] defendant's affidavit of compliance to plaintiffs' request for production of documents and things. There being no log with any information of the kind requested, there is no violation shown to the orders of the court."

Now, that is a statement you made on pages 23 through 24 of your response that you made on June 3, 1992?

A. Yes, sir.

Q. And then the immediately-following paragraph on page 24 of that response, you go on to say, "Plaintiff further complains that Al Svede has not produced his own log relating to the same subject. Defendant has certified, and based on the answer provided by Al Svede, that there is no record of any complaint of the type sought by plaintiffs' request. There being no information of the type sought as established by a complete search of the proper records of defendant and certified answer of defendant, there is no violation of this court's orders shown."

Do you see that?

A. Yes, sir.

Q. What were you referring to when you referred on June 3, 1992 to Al Svede's own log?

A. I was referring to the same search that had been conducted of the same safety logs.

Q. Okay. You have two paragraphs, one you clearly made reference to Kunkel's log, and then the next paragraph you [60] start out by referring to Al Svede's own log.

What were you referring to, Mr. Means?

A. Well, as I was trying to say, Your Honor, I was referring to the same logs and referring to the same certification that I had made based upon what Al Svede had told me of the checking of the logs. And that's—

Q. You mean when you used the words Al Svede's "own log," you are referring to Mr. Kunkel's log?

A. When I used the phrase "own log," I am quoting her complaint.

Q. Where is the quotation mark?

A. It's not quoted, Your Honor. I state that, "Plaintiff further complains that Al Svede has not produced his own log." I am repeating without quotations the complaints she makes.

Q. Where is it in her pleading, her motion, that she used the words "own log"?

A. Referring to page 11, the paragraph the court cited me to a moment ago, that reads, "Additionally, Al Svede testified in his deposition that he keeps a log."

Q. Were you alerted by the complaint the plaintiff made on June 1, that the defendant had not produced Al Svede's log, that there was such a log at that time?

A. No, sir, I did not know that he had his own log at that time.

Q. Did you make any inquiry at that time to determine whether [61] he did, bearing in mind that the plaintiff had complained on that date about your failure to produce it?

A. No, sir, I did not on June the 1st.

Q. Did you at any time thereafter make any inquiry to determine if there was such a log?

A. No, sir, I never asked him that question directly.

Q. Now, in the discussion, something that is not reflected in the content of my July 1, 1992 order, that precedes the quoted material on page 4 Ms. Robbins makes reference on page 45 of the transcript of the June 4th hearing. This is the morning session. "Mr. Svede testified that he had an accident log he kept and also the Fort Worth facility maintains an accident log."

Did you understand at that point that there were two different logs involved?

A. I understood that's what she was convinced there was. I did not understand that there really was anything that Mr. Svede had. I understood she was operating under that assumption, based on how she had read some regulations before and what she was continuing to say.

Q. And it was following that reference that you said, "I am stating under oath before the court as an officer of the court that my representations in that motion are correct"? That referred to your response to the plaintiffs' motion for sanctions? Is that what that referred to?

[62] A. Yes, sir, I believe so. I replied—

Q. Okay.

A. If we are talking about—I have the deposition in front of me. We are talking about page 50? I believe that's . . .

Yes, sir.

Q. And then you went on to say that what you were telling the court under oath is that a search of that log has been conducted and no accident has been identified—I believe it's 1987 through the present—for the premises at River Bend Finance Unit for both employee accidents and complaints of customer accidents?

A. Yes, sir.

THE COURT: Okay. Do you have anything, Ms. Robbins, that will help clarify, any questions that you think will help clarify where we are?

MS. ROBBINS: No, sir, I don't.
MR. KERR: May I redirect, Your Honor?
THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. KERR:

Q. Mr. Means, referring to the supplemental motion for sanctions that was filed on June 1 and received by you, and specifically page 12 where there is the reference that Al Svede testified in his deposition that he keeps a log, you said you were not alerted to the fact that at that point after you got [63] this document that there were two logs; is that right?

A. Yes, sir. I mean, I didn't—

Q. Why? Just answer my questions. Why?

A. I didn't recognize that as being the case. I understood from all the searching and everything I had done I knew about the only log that existed.

Q. So when you tell the court on page 4 of the transcript that you have searched the log or that there is no log, what log are you referring to?

A. I'm talking about the accident investigation log that's kept at the Safety Office; that we had checked, and there were no entries at all. So there was no log entry, nothing to produce. And there was none, which is what I was referring to.

Q. When you had looked at that log, Mr. Svede was with you and didn't say anything about his log; is that correct?

A. That is right.

Q. Mr. Means, why did you not make an inquiry after you got plaintiffs' supplemental motion for sanctions that was filed June 1 and received by you on June 1, an additional inquiry of Mr. Svede or Mr. Kunkel or anybody else, about the log?

A. Because I had already completed the full search with him of all the logs, and we had talked over and over

about is there anything else we are missing, anything we are forgetting, any other documents we are not finding. And I thought I knew the answer to that question at that point and didn't need to.

[64] Q. Mr. Means, what questions, in words or in the substance of the question, if any, did you ask Mr. Svede over this period of time that would have covered or called for his log, Exhibit No. 1?

A. I always referred to it as just I need to look at the accident logs. And maybe at some point, after it got to Kunkel's office, maybe I referred to it that way to where we need to go physically. I always asked him about any other documents we have got. I repeated to him about the claim the plaintiff was making, that the plaintiff had filled out documents and given to him and was convinced that that had happened. And I asked him about that over and over to verify if there was anything else he had forgotten about. And several times I talked about is there anything else we have anywhere else? What can we look at? We have got to make sure we don't miss something. That sort of comment.

Q. All right. I am talking specifically about after June 1 what kinds of questions were you relying upon to make the statements that you made after June 1 regarding the logs.

A. I was relying on all the discussions I had had with him prior to that time, primarily the full search and talking and extra work we had done on the 26th throughout the post office and all the different people we talked to and then when we worked together on the 27th and produced the documents.

Plus on top of that the other discussions I had had with [65] him prior to that extra search under the court's orders.

Q. Mr. Means, let me direct you to some of Ms. Robbins' comments that are recorded in the court's order of the July 1 order and from the June 4 transcript where she asks for Mr. Svede's log.

It turns out she was right, is that correct, there were two logs?

A. Yes, sir.

Q. Did you think she was on the right track when she made those statements?

A. Not at the time, not before I—

Q Why?

A. Before I saw it I didn't think it existed, and I thought the only thing that did exist was the one set of logs I had looked at, that I had seen and been told about in the Safety Office. And I thought she was just insisting that there was something there that wasn't.

Q. Had, in fact, she done that with regard to some other items of discovery in this case?

A. Yes, sir. And with these logs, too. She had gotten it—read a regulation wrong as to—

Q. Specifically, what are you talking about?

A. She cited at one point—I think it was—

Q. Talking about the logs at the post office?

A. Yes, sir.

[66] She made a reference to a part of a regulation or a part of a manual that says each unit or MSC or branch should maintain an accident investigation log, and she had been citing that as support for her claim that there should be a log separate to that address of the River Bend facility.

But the issue, what that regulation says, when it says "MSC," that's the main post office for this area. That's the log that they maintained at the Safety Office, which was in proper compliance with that provision of the manual. And that there was not any other log that they had to keep because they had one in compliancewith that manual at that main office, and that's the one we looked at.

MR. KERR: I will pass the witness, Your Honor.

THE COURT: Okay. Ms. Robbins, do you have anything else you want to ask?

MS. ROBBINS: Just one.

CROSS EXAMINATION

BY MS. ROBBINS:

Q. You stated that you never discussed the possible existence of two logs with Mr. Means until June 4th?

THE COURT: You mean with Mr. Svede?

MS. ROBBINS: I'm sorry.

Q. (By Ms. Robbins) With Mr. Svede?

A. No, ma'am. I did not—I discussed the logs, but I did not know—

[67] THE COURT: Just answer her question.

THE WITNESS: I believe the answer is I did not discuss a second log with him until I am saw it on June the 4th.

Q. (By Ms. Robbins) Okay. And once you received the plaintiffs' supplemental motion for sanctions, I believe, on June 1st, did you show this document to Mr. Svede, knowing that a hearing would be held and everything may be on the line in this case? Did you physically show him the document so he could read each item to help you comply?

A. Did I show him your supplemental motion?

Q. Yes, sir.

A. No, I did not.

MS. ROBBINS: Okay. Thank you.

THE COURT: Okay. You can step down.

You can step down.

THE WITNESS: Yes, sir, Your Honor. I was trying to.

MR. KERR: That is all we have, Your Honor.

THE COURT: Okay. Do you have any statement you want to make beyond what you have already said?

MR. KERR: Yes, Your Honor, if I could take less than 10 minutes to try to sum up.

THE COURT: Okay.

Your Honor, I think the uncontroverted evidence in this case is that Mr. Means should not be subjected to a show-cause [68] hearing for criminal contempt because of Al Svede's testimony.

He candidly, I think, and compellingly confirmed that Mr. Means did not have Court Exhibit No. 1 until shortly after noon on June 4. He didn't even know about Exhibit No. 1 to hide it, and that he made no effort to conceal or suppress that document.

Second, Your Honor, Mr. Means did not violate Rule 11 or the local rules of this court when he signed and filed his affidavits of compliance, when he signed and filed his response to discovery requests and made his statements to the court that have been recorded in the transcript, because he believed—and he more than believed; was convinced. Otherwise, he wouldn't have made those kinds of statements—of the truth of the statements.

And, more importantly, far more importantly, whether he subjectively believed them or not, he had good reasons to believe them.

And here's the guts of it.

He reasonably believed that Al Svede's log didn't exist because of all the conversations he had had with Al Svede who told him there's no reference in the post office logs, the Safety Office logs, the logs in general, about River Bend or any of the Chilcutt accidents specifically.

Now, it's very important that Mr. Svede, not only talked to Mr. Means, but went to Mr. Kunkel's office to look at the [69] Safety Office logs which Mr. Means understood to be the only logs.

Mr. Svede went with Mr. Means, visited with Mr. Kunkel, and Mr. Svede was the man who had been questioned three or four times about the specific items in the discovery requests, had helped Mr. Means arrange the meeting with Mr. Kunkel and with other people, participated in the review of the logs in Kunkel's office, and confirmed on May 26th and again on May 27th that everything that was possibly responsive had been produced. There was nothing else.

Now, the only item of information prior to June 1, prior to the day on which the supplemental motion for sanctions was filed, the only hint that Mr. Means could have known about Al Svede's log, was the three or four

words from the one line of his 120-something-plus-page deposition.

Your Honor, he also testifies from the lines we read that the only information, in his view, would be contained in Mr. Kunkel's log. And that is what we read out of Defendant's Exhibit No. 2 on page 7, I believe.

Your Honor, it is easy to see, I believe, how, in view of all of these conversations, Mr. Means truly believed that Mr. Svede's reference in that one spot of the deposition to my log meant the post office logs, especially after all of the contact he had with Mr. Svede where Mr. Svede didn't say a word about the documents that Mr. Means was seeking.

[70] Now, after June 1 where the plaintiffs' pleadings do specifically refer to Al Svede's log, Mr. Means, I remind you, had just been out at the post office, I guess, six days prior to that or five days prior to that and completed his discovery. He didn't, as Ms. Robbins points out, take that supplemental motion for sanctions and give it to Mr. Svede.

In view of everything else that had been done and collected and all of his prior conversations, I don't think that's unreasonable because he said to Mr. Svede on two occasions, look, they think we are not giving them everything. The court wants me to be sure that we have everything. The court is upset, the plaintiffs' counsel is upset. Give me everything.

And Mr. Svede had given him everything but failed to give him the log.

Your Honor, I think it's also understandable that Mr. Means took this position because there had been other things like this post office log for each unit and like this correspondence that—or, rather, interview or affidavit that Mr. Svede allegedly took from the plaintiff where those documents didn't exist, either. This was just one more document that she was asking for that didn't exist.

There was no intent or malice at all to conceal this document. I think Mr. Svede is perfectly candid and

bravely tells you it just didn't occur to him. It was rolled up in the back of his filing cabinet.

[71] Now, Mr. Means may be guilty of two things, Your Honor. And one of them is that he was late in his discovery responses. And I am not here to reargue that motion. That's water under the bridge that's already been done. I am only going to say that Mr. Means and his client have been assessed a punishment and a sanction for that. But, Your Honor, being late on discovery in one case, especially when the sanction has already been issued to rectify the harm, doesn't make Mr. Means incapable or unsuitable or unqualified to continue to practice in this court and shouldn't subject him to further sanctions.

Secondly, Your Honor, I think Mr. Means, likewise, shouldn't be sanctioned or barred from practice in this court or subjected to a show-cause hearing because of his second transgression, which I alluded to in my opening remarks. That second transgression is making a shoot-from-the-hip argument when, as I said earlier, he learned of the document an hour-and-a-half or so before he came in that he had already told the court didn't exist. And he told the court it didn't exist because of what Mr. Svede had told him.

Now, those two faults can be cured by experience, I think. In large measure they have already been cured by the experience in this case. Mr. Means realizes that he made those statements to the court, and they were not particularly good arguments, I believe. I think we will all acknowledge that; that the argument that these documents aren't within the call. I don't [72] know why he did it. The only excuse he has got is that he panicked.

And, Your Honor, that one item of panic shouldn't disqualify a personal from practicing in this court, and it shouldn't subject him to further sanctions. He didn't lie.

He might should have gone after June 1 and asked Al Svede directly, Mr. Svede, for the first time they are now saying—they are now saying for the first time, after all these hearings, that you have got a log separate and apart from that.

I wish—You know, if I had of been in Mr. Means' shoes, I wish I would have had the presence of mind to have done that. I hope I would have. But the fact that he did not do it is understandable. It would not be understandable in most circumstances. It truly wouldn't. But in this case it is because he spent so much time, asked so many questions, and spent so much thought in trying to get with Al Svede and get these documents produced. He was shown the logs, and he had no reason to believe that the logs he was shown were not the only logs in the post office.

For those reasons, we respectfully request that the court relieve Mr. Means of a show-cause hearing for contempt in this matter; let him get on with his practice in this court; and, with more experience, be a very valuable member of the U.S. Attorney's Office and this court.

THE COURT: Thank you.

[73] Okay. Let me state some initial reactions.

One of two conclusions has to be reached: Mr. Means either is totally incompetent as an attorney, or he made blatant misrepresentations to the court. Only one of two conclusions can be reached.

We start with a delay of approximately 30 days before he even, according to what I am hearing now, starts working on the response to discovery requests which required that the responses be made in 30 days. They still had not been made at the time of the hearing, which was held 30 days thereafter. That's a starter.

And, as you pointed out, Mr. Means has been—actually hasn't been sanctioned for that. He has been ordered to pay the attorneys' fees of opposing counsel for that. And I believe that is the subject matter of an appeal, if I am not mistaken.

But that is only the start.

At the May 22 hearing I could not have made it any plainer to Mr. Means that I wasn't going to tolerate any further discovery abuse by the government and that I expected there to be a full disclosure. I couldn't have made it any clearer.

I confirmed it by saying that I wanted it verified by an affidavit that he had made an appropriate inquiry and that his response to the discovery—or the defendant's response to the discovery was being made in an appropriate way and that full [74] discovery was being had, bearing in mind at this point in time that the accident log by Mr. Svede had been mentioned on a deposition. But we'll put that aside for a minute.

I get an affidavit or a declaration signed by Mr. Means under penalty of perjury saying that it's true and correct telling me that there is no document of a kind—that this accident log doesn't exist, is what he told me. He told me that he got that information from Mr. Svede. And that was said by Mr. Means under the penalty of perjury for me to rely on.

And then on June 1 it was again specifically called to Mr. Means' attention that there were two accident logs—there was a Kunkel log and there was a Svede log—by the supplemental motion that the plaintiff filed, and she pointed out that neither had been produced.

Now, if Mr. Means were to be given the benefit of some kind of doubt up to that point in time, it would rapidly vanish when he responded on June 3 in writing. He, first of all, gave an elaborate explanation of why Mr. Kunkel's accident log wasn't produced and then followed by saying that plaintiff further complains that Al Svede has not produced "his own"—those are Mr. Means' words—relating to the same topic; that is, the subject of accidents.

He goes on to certify and represent to the court in a document signed by him that defendant has certified, based on the answer provided by Al Svede—this is referring to Al [75] Svede's own log, according to Mr. Means—defendant has certified, based on the answer provided by Al Svede, that there is no record of any complaint of the type sought by plaintiffs' request.

That couldn't be a more direct statement to me and to opposing counsel that inquiry has been made of Al Svede about his own log, as opposed to Mr. Kunkel's log, which

was discussed in the preceding paragraph, and that that inquiry resulted in a response by Mr. Svede that there is no record of any complaint in that log.

Then at the June 4 hearing, the discussion on page 45 of the transcript, Ms. Robbins says, "Mr. Svede testified that he had an accident log that he kept, and also the Fort Worth facility maintains an accident log."

Then there was some discussion there about the two different accident logs.

Then I asked Mr. Means the question, "Why haven't those accident logs been produced?" That referred to what had previously been identified on the record as Mr. Svede's and Mr. Kunkel's.

Mr. Means says, "A search has been conducted of those accident logs, as we have set out in our response to this supplemental motion"—again, referring me back to his reference to Mr. Kunkel's log and Mr. Svede's own logs—"as we have set out in our response to this supplemental motion, [76] and there is no record in those logs relating to any accident or complaint on the premises of River Bend."

There couldn't have been a more blatant representation to the court that neither log, Mr. Svede's log or Mr. Kunkel's log, had any reference to any accident on the premises of River Bend.

And then the same thing happened throughout, the references to these logs and the fact that none of the logs show any reference to the accident at River Bend.

I think I have already mentioned the statement he made, "I am stating under oath before the court as an officer of the court that my representations in that motion"—obviously referring to this response where he said that Al Svede's own log didn't contain any reference to the accident—"that a search of the log has been concluded and no accident has been identified," so on.

Those are the only conclusions I can reach from what I have heard, either that he just is absolutely totally incompetent or he has made some of the most serious mis-

representations a lawyer can make to a court, representing under his oath, as his words, something that is false.

Now, you are saying he didn't know it was false. He used awful strong language, if he didn't know it was false. So maybe that falls in the first category.

So I've got a hard decision as to where I go from here. I [77] don't want to embarrass the U.S. Attorney's Office.

Mr. Collins, you have sat through this hearing, and you have heard what has happened. I would like any comments you have to make.

MR. COLLINS: May it please the court.

THE COURT: Yes.

MR. COLLINS: Your Honor, I appreciate the opportunity to make comments on a matter of serious concern to the court. And with the court's permission, I would like to offer first a couple of general comments about the U.S. Attorney's Office and the practice in the U.S. Attorney's Office and then some specific comments with regard to this.

THE COURT: Okay.

MR. COLLINS: First, generally, I'm very concerned —regardless of what may be the root cause in this case— I'm very concerned that we have had a discovery matter like this go this far and the documents not produced as requested and ordered.

So on Friday I did issue a memo to all the assistants, criminal and civil, to exercise extreme care and diligence in their document production and in discovery, both criminal and civil cases, and to also pay close attention to what is requested of and represented by various agencies. As you know, we deal with a lot of agencies.

I'm very concerned, regardless of the extent to which [78] discovery requests and orders by the court went in this case, the documents were not produced until the 11th hour. And I think that is something that we certainly do not wish to have and—

THE COURT: And let me interrupt you. And I appreciate the sentiments you are expressing. But I think

you also realize they never would have been produced, had I not, on my own, ordered the witness to come to the courthouse and ordered that he bring the documents with him.

MR. COLLINS: I do.

THE COURT: In other words, this case would have been tried.

MR. COLLINS: I do understand that, Your Honor.

And that's inexcusable. I don't offer any excuse for that for the office, except to say that I certainly intend that it not ever happen again.

And, in addition to that memo, I'm going to instruct all of my supervisors, criminal and civil, to raise the level of sensitivity of all Assistant U.S. Attorneys to discovery matters such as this.

I think sometimes we do not exercise the care that we should in dealing with the myriad of other agencies we deal with. And sometimes, while we may understand it, we do not communicate the understanding of how vital it is to the agencies we deal with that everything be produced for our [79] inspection so we can decide if it does or does not need to be produced under discovery.

And certainly it is the intent of this U.S. Attorney and this U.S. Attorney's office that something like this absolutely not occur again.

With regard to the specific allegations in this case, first I want to say that whatever strong points or weak points that Mr. Means may have as an attorney, I personally have never had any occasion to question either his diligence or his honesty.

During a brief period of time in 1981 and '82 I was a criminal district judge at the state, and during that time Mr. Means was a prosecutor assigned to my court on a daily basis. And during that period of time I did not have any reason to question either his diligence or—

THE COURT: I guess that was one of the questions I had.

Since he has been an Assistant United States Attorney, has there been any question raised by anybody concerning his conduct from an integrity or ethical standpoint?

MR. COLLINS: Not from an integrity or ethical standpoint, Your Honor.

At one point I had what I considered a serious in-house problem with Mr. Means' inability to get along with his supervisor in the criminal section.

THE COURT: I am not interested in that.

[80] MR. COLLINS: And that was all taken care of, but that absolutely did not involve his competence or diligence.

THE COURT: Well, I am not interested in that sort of thing.

MR. COLLINS: Right.

And I will say, during the time particularly that he was in the criminal section from 1987 until November of 1990 in this office, I didn't get anything but high marks from the courts before whom he practiced as a criminal prosecutor.

I do have very serious concerns with regard to this court's confidence or lack of confidence in any assistant. I'm absolutely convinced before you made your remarks that this court at this point in time does not have that confidence in Mr. Means, and I instructed his supervisor to re-assign Mr. Means from all cases in this court. And we will not assign him to any cases in this court, unless and until we receive permission from the court and the court is of the opinion that this is something we can do.

THE COURT: Well, let me say this on that subject: As long as a lawyer is a member of the bar of this court, I would never suggest that he should not be permitted to practice before me, because the mere fact that I have had an unpleasant experience with a lawyer at some point in time is not going to change my reaction to his client's situation in a lawsuit or my evaluation of the outcome that a lawsuit should have.

[81] MR. COLLINS: I understand that fully, Your Honor.

And this decision was reached by me basically because I feel like there is a crisis of confidence, so to speak, that

the court has with regard to Mr. Means and his conduct in this matter. And it's my desire, as United States Attorney, to make sure that when a representative of the U.S. Attorney's Office comes into this court that there not be such a crisis of confidence.

THE COURT: Okay. Well, that is your business. But my thought is that is not necessary, assuming he continues to be authorized to practice before the court.

MR. COLLINS: Certainly.

And, secondly, Your Honor, I do think it is appropriate that Mr. Means be given further training. We do have training available at the Department of Justice. It is excellent training. Frankly, it is more difficult to get an attorney with his years of experienec into those courses, but I will personally see to it that the next available civil trial advocacy course is taken.

I don't think that solves all the court's problems in this regard. I simply want the court to know that we are not going to turn our back on something of this matter and not take further steps.

And, of course, finally, I will make sure that his supervisor, Mr. Brown, who is here in court today, would [82] closely monitor and supervise his conduct.

In closing, I am not sure it is appropriate for me, as United States Attorney, to offer any of my own personal conclusions in this matter, except to say that I felt like when I was listening to Mr. Svede and Mr. Means that they were both expressing what occurred in the case. I don't offer that as an excuse.

I think it is inexcusable that we have reached this point and that the right questions were not asked appropriately in order to get these documents produced. And I would assure the court that, if the court gives us the opportunity to do so with Mr. Means, we'll take all necessary steps to see that it does not happen again.

THE COURT: Okay. Thank you very much.

MR. COLLINS: Thank you.

THE COURT: I see that you are making some notes. Did you have something that you had proposed to say?

I will give you an opportunity to say something, if you do.

MS. ROBBINS: It's kind of awkward for me to express an opinion about this because it is—

THE COURT: Well, you are not obligated to express any opinion, if you don't want to. I'm just—I have invited you to participate. I thought your prior history in the case could be beneficial. I will give you an opportunity to say something.

[83] MS. ROBBINS: There is one matter, a fact matter, as far as when his knowledge of the existence of the second log came about and the fact that there was an entry in Mr. Svede's log, at the time we were having the afternoon session of the June 4th hearing. And I believe the testimony earlier was that he had learned about the existence of that or the entry in the log after having looked at it—or maybe it was the first log he was referring to—an hour-and-a-half before the hearing or at the noon hour.

My client informed me that Mr. Svede, when he first got on the stand and you asked him—

MR. KERR: Your Honor, I'm sorry. This is not a statement; it is hearsay testimony.

THE COURT: Well, this is a hearing to determine whether there will be another hearing. And if she has information she can relate to me about what might be developed in another hearing, I would like to hear about it.

Go ahead.

MS. ROBBINS: I was questioning the witness at the time and looking at him, and I believe you had asked him the question about is there any notation about Ms. Chilcutt's accident in your log. And I believe the testimony was that Mr. Means had found out about that earlier.

And I am confused because my client informed me that, in her words, he nearly fell out of his seat when Mr. Svede [84] admitted that there was a notation in that

log. And I was clearly shocked by it because I had thought that there was Mr. Svede's log all along.

And so I am kind of confused about that, and I am not sure that the testimony that we have heard corresponds with the reaction of Mr. Means at that revelation.

And that's all I have to add, Your Honor.

THE COURT: Okay. Thank you.

Well, something else that I think would be appropriate for me to mention in the record, of course, I think Mr. Svede is basically being honest. But I think he might be —and, frankly, I am taking his testimony with a little bit of a grain of salt because of the unlikelihood that he would remember the details of the things that were said between him and Mr. Means back at that time. I think it more likely that Mr. Means was telling it the way it was when he referred in the documents that we have talked about to Mr. Svede's own log, and that Mr. Means knew Mr. Svede had a log.

And I think it likely, almost a certainty, that Mr. Means was representing to the court intentionally that Mr. Svede's own log didn't report the accident in question.

And, of course, that raises the possibility or the prospect that the reason Mr. Svede's log was concealed is that it disclosed other accidents that occurred in a close proximity from a time standpoint.

[85] So the question I have to answer now is where do we go from here?

Mr. Means, do you want to make any comments on your own behalf?

MR. MEANS: Yes, sir.

THE COURT: You do?

MR. MEANS: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MR. MEANS: If the court has reached the conclusion that I saw that document, was scared of it for some reason in this lawsuit, and intentionally hid it or took action to hide it or prevent its disclosure, I'm sorry, but the court is wrong. I did not do that.

When I stand in front of the court and make a statement that, as an officer of the court under oath, I'm stating a particular fact, I was honestly telling the court the truth as I knew it. And I don't know any other way to say that, Your Honor.

The court's conclusion that when I was referring to Svede's log in the responses and during that hearing, as I have listened to what the court has said, it seems to me the court is of the conclusion that I was trying to refer to both logs and cover both logs (meaning the Svede log and the Kunkel log) when I was referring to the fact that the logs have been searched and that no entry was found, and that, therefore, I [86] must clearly have been hiding the fact of the Chilcutt entry in the Svede log.

That conclusion is not correct, and I can do nothing except respectfully disagree with the court's conclusion or speculation on that point.

My references to the logs being searched has always been, and specifically was, to the searching that had been done of the logs that we have come to describe as being those in the Kunkel office or the Safety Office.

And I did not ever understand or see or know of the existence of this separate Svede log until it was brought to my office and we had it before that hearing that afternoon. And I can do nothing more other than tell the court that is my truth. I stand by that, and I have no choice but to face whatever judgment the court wants to make in light of that.

THE COURT: Well, Mr. Means, let me ask you this: Why were you referring to Mr. Svede's "own log"?

Well, I think I went over that with you while you were on the stand.

To me, that's inexplicable. But you have given me your explanation.

MR. MEANS: Well, not to repeat, but my reference, Your Honor, is to the allegation in the plaintiffs' position about his having a log. And the response I make is refering to the certification, which is where Svede has told me

the logs [87] have been searched and that we're responding. And I am talking about the one package of logs in response to both issues. We have searched the logs, and that's our response to both issues.

And simply in describing the Kunkel search, I went through all the detail about the Kunkel search and was referring to the overall search in my second reference in talking about his allegation, or her allegation about his log.

THE COURT: Okay. Thank you.

Let me ask you this, Mr. Kerr: If I decide that the thing I should do is something less than criminal contempt, does your client want another hearing?

MR. KERR: Your Honor, I would like the opportunity to discuss that with Mr. Means.

THE COURT: Well, visit with him a minute because it would occur to me that everything to be presented has been presented here.

MR. KERR: I think that's correct, Your Honor.

THE COURT: Confer with your client a minute.

MR. KERR: May we step out?

THE COURT: Why don't we take about a 10-minute recess?

MR. KERR: All right.

(Recess was taken.)

THE COURT: Okay, Mr. Kerr.

MR. KERR: Your Honor, if I understood the court's [88] question correctly, we'll not ask for an additional hearing on these matters, should the court decide not to pursue a show-cause hearing for criminal contempt.

Does that answer the court's question?

THE COURT: That's my question.

Okay. I have decided I'm not going to pursue the matter of criminal contempt further. I think that this is a case where a court could find beyond a reasonable doubt the elements of criminal contempt, but I guess, in a sense, I am giving Mr. Means the benefit of the doubt and simply am not going to pursue that.

I'm also taking into account in deciding what I am going to do Mr. Collins' assurance relative to the matters that he gave the assurance with reference to, except that I am not asking for assurance from Mr. Collins that Mr. Means won't appear before me again. That will be a matter that Mr. Collins will have to decide. Implied in what I have just said is the conclusion that, again, I am going to give Mr. Means the benefit of the doubt and I am not going to bar him from practicing before the Northern District or before me.

I am ordering that the record of this hearing be included in any appellate record in this case, if there is an appeal. I'm ordering that the record pertaining to the matters that have been dealt with so far be unsealed, to the extent we have sealed orders or any other sealed matters in this case.

[89] I'm ordering that, in addition to whatever training the office of the United States Attorney causes Mr. Means to have, that Mr. Means attend, at his own expense and not at the expense of the government—and I expect him not to be reimbursed by the government—15 hours of continuing legal education or another course provided by an accredited institution of training in ethics or professional responsibility or whatever the course might be called.

And in the written order that I make I will require that there be a verification by affidavit at some point in time that that has occurred, and I expect it to occur no later than November 1, 1992; that is, the attendance at the continuing legal education or other accredited course on ethics and professional responsibility. And the reporting to the court by affidavit that that has occurred will be on or before that date.

I consider that Mr. Means is somewhat on probation in the sense that I can—I will consider that I can take into account things that have already occurred in deciding on any future action I take in reference to Mr. Means, if there in the future arises an occasion for me to take action in reference to Mr. Means.

I'm ordering that Mr. Means reimburse Ms. Robbins or pay Ms. Robbins an amount that would be a reasonable fee for the time she's devoted to preparation for this hearing and [90] attending this hearing. I wouldn't anticipate there would be significant time devoted to preparation, but she has been in attendance. That's been pursuant to my order. And I think that I would consider that her attendance was appropriate under the circumstances and that it's something she didn't bring about on her own, but, rather, it was brought by the conduct of Mr. Means.

So I might ask now—We might fix an amount now.

Ms. Robbins, how much time have you devoted to this, the matter of this hearing, and the events leading up to it? And include the amount of time it will take you to get back to your office. If you can give me a number now, it might help.

MS. ROBBINS: Four hours today, including travel. I was here at 8:00 o'clock.

I'm sorry. I left my office at 8:00 o'clock. I was here at 8:30, and then I spent an hour prior to that just reviewing the documents.

THE COURT: Okay. A total of 5 hours.

I am going to conclude that $150 an hour—I don't recall. What was the per-hour rate we used before, Ms. Robbins, if you recall?

MS. ROBBINS: You had decided 125.

THE COURT: Okay. I will use the same per-hour rate.

So the reimbursement will be $625, and I will expect Mr. Means to make that payment to Ms. Robbins within 30 days from [91] today. I expect that payment to be made out of Mr. Means' funds and Mr. Means not to seek any reimbursement from the government with respect to that payment.

And I reserve the option to require a verification on those subjects by affidavit from Mr. Means.

Okay. Those are the only orders I'm going to make.

And I will say to Mr. Means that I think you probably deserve more, but I am giving you the benefit of the doubt.

And I appreciate the attitude Mr. Collins and his office has had on the subject.

You are excused.

U.S. POSTAL SERVICE

NON-VEHICLE ACCIDENT REGISTER

CCIDENT DATE (3)	CASE NO (4)	NAME OF INJURED PARTY OR OWNER OF DAMAGED PROPERTY (5)	ADDRESS OF INJURED PERSON OR PROPERTY OWNER (6)	ACCIDENT LOCATION (7)	NAME OF POSTAL EMPLOY
12-88	9-1A	ORBRA DILLION	4501 RIDGE NORTH	4501 RIDGE NORTH	KEVIN T PA
4-88	9-2A	BRENDA CHILCETT	108 CURTIS DRIVE WEATHERFORD TX	RIVERBEND P.O. LOBBY	N/A
6-88	9-3A	LUCILLE GIBBS	5033 COTTEY ST.	POLY STA. P.O.	N/A
21-88	9-4A	GLENDA WILLIAMS	3505 BRAMBLETON	GLENCREST STA	MARSHALL HENDR
27-88	9-5A	SUSAN MORGAN	1305 PLANTATION DR. NORTH	GRAB 7800 BEDFORD-EULESS RD	PATRICK JONES
21-88	9-6A	TERESSA PIKE	3725 CENTURY PLACE #302	W. WOOD STA PARKING LOT	N/A
27-88	9-7A	TAMARA ISBEL	7405 TALLOW WIND #A	W/WOOD P.O.	N/A
7-88	9-8A	MORGAN, MICHAEL	4000 ALLENDALE	GRAB PO	N/A
5-89	9-9A	GENE BLESSING	P.O. BOX 40495	BMAH GMF FT WORTH	N/A
1-89	9-10A	CLIFTON DAVER	3828 HARDEMAN	POLY STATION	N/A
1-89	9-11A	CHARLES DAVIS	7433 DENVER	GRAB STATION	N/A
1-89	9-12A	DOROTHY MCMAHEL	1942 FAIRMONT	DOWNTOWN STATION	N/A
1-89	9-13A	ERIN McKINNEY	8604 CRESTVIEW	GMF BMAH	N/A

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120 a

APPENDIX J

(1) POST OFFICE: FORT WORTH, TX 76161-9998

(2) FISCAL YEAR: 1989

VOLVED	DESCRIPTION OF INJURY OR PROPERTY DAMAGE (9)	DATE TORT CLAIM RECEIVED (10)	AMOUNT PRIVATE PARTY CLAIMED (11)	DATE FORM 2198 FORWARDED (12)	FORM 2198 FORWARDED TO (13)	DATE TORT CLAIM ADJUDICATED (14)	AMOUNT PAID (15)	INVESTIGATOR'S INITIALS (16)	REMARKS (17)
	MULTIL BRK	10-14-88	$425.00	10-24-88	D/F		$350.00	AS	
	INJURED NECK	4-17-91	550,000.00	suit	Filed	Fed Ct.		AS	PATRON FELL IN LOBBY OF RIVERSIDE P.O.
	INJURED BACK + NECK	11-17-88	$5,000.00	11-30-88	INSP	1-18-89	-0-	MS	PATRON PLEGES FALL IN LOBBY OF POLY STA.
ON	" "	8-17-89	$75,000.00	8-18-89	INSP			D/F	PATRON FELL IN LOBBY OF SUNDANCE STA
	CUT ON HAND	2-1-89	$5,065.00	2-1-89	INSP				SCRAPPER FELL FROM WINDOW SILL, CUT PATRON'S HAND.
	CUT ON HEAD	1-5-88	$54.95	1-6-89	INSP			CG	YOUNG LADY WALKED UP TO DROP BOXES, TRIPPED ON LUGS, STRUCK HEAD ON BOXES
	DISLOCATED KNEES	2-22-90	$60,300.-	2-27-90	FIELD LEGAL SERV.			RP - GR	PATRON SLIPPED ON RAIN SLICK LOBBY FLOOR
	FELL IN LOBBY INJU B							WD	
	BROKE TOE							AS	
	SCR: FROM FALL							DH	
	NECK FELL PARKING	6-21-89	$200,000.-	6-28-89	INSP			AS	
	FELL DOWN STEPS							BJ	ALLEGES FALL IN PARKING LOT PATRON FELL DOWN STEPS /SAID SHE MISSED THE LAST STEP / PO CALL AMBULANCE
	INJURED TO							WP	PATRON INJURED WHILE LOADING MAIL IN APC, (EMA

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APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1668

BRENDA CHILCUTT, *et al.*,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendant-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

PETITION FOR REHEARING

The Department of Justice views with the utmost concern any failures of its attorneys to conduct litigation in accordance with high professional standards. In our submissions to this Court, we have acknowledged the substantial shortcomings in the conduct of this case in the court below. While we have argued that those shortcomings did not warrant the severe sanctions that the district court imposed, we have not asked the Court to condone the government's admitted failure to comply with discovery requests in a timely and complete manner.

Nevertheless, we are very much concerned that this Court has seriously misapprehended some of the pivotal

facts of this case. We must, of course, accept a large degree of the responsibility for such misapprehensions, for we doubtless failed to convey with adequate clarity certain key aspects of the record below. Regardless of the causes, however, we submit with the greatest respect that the Court's opinion contains manifest factual errors that are plainly contradicted by the record below. For example, the Court states that the government withheld a document that contained information about additional accidents (apart from plaintiff's) at the same Postal facility. *See* slip op. at 531 & n.21. In fact, inspection of the document in question reveals that it contains *no* such information. *See* E.R. 63-66. The Court also states that trial counsel "blatantly" misrepresented the content of an accident log to the district court, on the theory that he claimed to have reviewed that document and to have determined that it did not contain information about plaintiff's own accident. *See* slip op. at 526-27. The record below, however, shows that counsel's statements referred to a *different* set of logs, which in fact contained no entry regarding plaintiff's accident, and that he learned of the existence of the second set of logs only moments before it was presented during the hearing on June 4, 1992.

These factual errors are of great importance in this case, we submit, because they appear to lie at the heart of a distinction we have stressed—*i.e.*, that between carelessness and dishonesty. We recognize, of course, that this distinction may not be dispositive by itself, for substantial sanctions may be appropriate even where errors are not intentional. *See* slip op. at 532 & n.23. Nor do we mean to excuse carelessness in the conduct of civil litigation, for we recognize that it may be equally disruptive of the judicial process, and cannot be condoned. Nevertheless, there can be no doubt this disinction is of great importance in the present case—not only because it is a pertinent factor under the law of discovery sanctions, but also because of the manner in which the public

record of this case will reflect on the character of the inviduals involved.

A number of the factual statements contained in this Court's opinion also go beyond the pertinent findings made by the district court itself. The district court made emphatically clear its condemnation of the handling of this case by government counsel. Yet, when all was said and done, it acknowledged some uncertainty as to whether the missteps reflected lapses in honesty or competence, and stopped short of entering findings establishing misrepresentation or other intentional malfeasance. The district court specifically and repeatedly gave counsel the "benefit of the doubt" in declining to impose criminal contempt. *See* July 28, 1992, Tr. at 76, 88, 91. In contrast, this Court's opinion appears to take it as conclusively established that counsel made purposeful misrepresentations to the court below concerning the existence and content of documentary evidence. For the reasons presented below, we respectfully submit that this conclusion is in error, as are certain other factual recitations in the Court's opinion that go beyond the facts as expressly found by the district court.

In light of the seriousness of the misconduct charged in this case, appellants earnestly request that Court carefully reexamine the record evidence regarding these issues. We respectfully submit that such a reexamination will confirm that, despite the acknowledged lapses in the government's actions below, the record does not support a conclusion that those lapses included "blatant misrepresentations," or the intentional withholding of documents. *See* slip op. at 532. Moreover, regardless of whether such a reconsideration alters the ultimate disposition of this case, we request that the Court consider the amendment of its published opinion, to ensure that it reflects a fair and balanced view of the facts.[1]

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[1] Because we address principally factual issues, we are submitting only this Petition for Rehearing, and have chosen not to burden the entire Court with a Suggestion of Rehearing *En Banc*.

1. Much of the attention in this case has focused on an accident log, maintained by Al Svede of the Postal Service, which was not produced in discovery but which came to light at the hearing of June 4, 1992. We do not deny that this log was called for by the discovery requests and should have been produced. We do, however, submit that the evidence presented in the court below—including the uncontradicted testimony of Mr. Means and Mr. Svede—confirms that Mr. Means did *not* know of its existence at the time that he made the statements that this Court has condemned as "blatant misrepresentation[s]." *See* slip op. at 531. As demonstrated below, counsel's previous statements regarding the set of logs that he had seen—*i.e.*, the statements that prompted this Court to state he had to have seen the crucial log (slip. op. at 528)—actually referred to an entirely different document, a second set of logs, maintained by different Postal Service personnel.

In approaching this issue, the Court has recognized that the content of the document is a key starting point. Withholding such a document could only make sense—even assuming the very worst motives on the part of a government counsel—if it contained information that would be helpful to the plaintiff's case. *See* slip op. at 531 n.21. Unfortunately, the Court appears to be laboring under some misimpressions about the content of the document in question. The Court states, for example, that "the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office." Slip op. at 531. The Court also states that "[t]his log apparently contained information about remedial actions taken by USPS in response to Ms. Wortham's accident, as well as information on other accidents which occurred at the River Bend location." *Id.* at 525 n.6.

The document in question, however, does not in fact contain any information of the sort referred to. The "withheld" log, which is the one that came to light at

the June 4 hearing, is the one of which we provided a copy at pages 63-66 of the Excerpts of Record. As the Court will see upon reviewing that document, plaintiff's accident is the *only* one listed that took place at the River Bend Post Office. The information provided about plaintiff's accident, moreover, is very limited, and includes no previously undisclosed information. In addition, this log provides *no* information about remedial steps taken in response to any of the incidents listed.

When the district court considered this point, it nevertheless concluded that the log might be useful to plaintiff by leading her to further inquiries regarding maintenance practices of the Postal Service. *See* June 4, 1992, Tr. at 107-08. We acknowledge that the log could have some potential value of this sort, but we submit that any such value is highly attenuated. It is wholly implausible, we submit, that counsel would take the risks inherent in willfully withholding relevant discovery materials merely to keep a document of such limited usefulness out of the hands of plaintiff.[2]

In this regard, we would also like to disabuse the Court of another misimpression under which it appears to have been proceeding. The Court has stated that "the same contractor cleaned all of the post offices in the Fort Worth area * * *." Slip op. at 525 n.5. If this were true, it might tend to enhance the pertinence of the second log. However, the district court made no such finding, and indeed there is no evidence in the record that would bear out such a finding. On the contrary, had this issue been raised in the court below, the government could have adduced evidence clearly showing that the contractor in question cleaned only a limited number of postal facilities, and indeed that the facilities that she cleaned ac-

---

[2] Moreover, as discussed below, the record shows that government counsel in any event did not know about the existence of this second log, at the time he explained to the district court that the log that he had reviewed contained no relevant information.

counted for *none* of the accident entries on the "concealed" log, apart from plaintiff's own accident.[3]

Thus, the accident log principally at issue contained no information significantly damaging to the government's case, but on the contrary was quite routine. We submit that it is not plausible that, even assuming he were otherwise dishonest, counsel would resort to dishonest acts—either intentional withholding or lying about its content—simply to keep such innocuous information from coming to light. The document itself—which contains no new information about plaintiff's accident, nor any information at all about other accidents at that location or at other facilities cleaned by the same contractor—undermines any presupposition of bad motive. It is equally implausible that the parties would initially contrive to hide such a document, only to produce it for the court's examination at a later point. Such action demonstrates that confusion, as opposed to willfulness, prevented its earlier discovery.

2. It also appears that we may have failed to make clear to the Court one of our key arguments regarding the causes of the difficulties in the court below—the fact that there were *two* sets of logs, one of which—the second, supposedly "concealed" log—was unknown to government counsel until the June 4 hearing. At some junctures of this Court's opinion, the Court appears to be proceeding upon the understanding that Mr. Means made express statements that the second "Svede" log itself did not contain information regarding plaintiff's accident. *See* slip op. at 533 ("Mr. Means stated as an officer on the court that he had reviewed Mr. Svede's log and had determined that it was not responsive to the plain-

[3] These facts are reflected in the deposition testimony of Marilyn Chapman, the cleaning contractor, which was taken in this case on May 28, 1992. Although that deposition was not made part of the record in the court below, we would be happy to provide a copy to this Court, should it wish to confirm our representations.

tiffs' requests for production"); *id.* at 527 (reciting that the Svede log "did, indeed, list Ms. Wortham's accident, contrary to Mr. Means' earlier statement that *it* did not" (emphasis added)).

The record reflects, however, that Mr. Means made no such express statements. On the contrary, Mr. Means referred, in the district court colloquy upon which this Court has focused, only to a set of "logs" of which he was aware, saying that it did not contain any entry of plaintiff's accident or of any other accident at the River Bend Post Office, and was therefore not called for under plaintiff's document request. *See* slip op at 526-27 n.12 (quoting June 4 Tr.). In particular, Mr. Means' statement, "as an officer of the court," was that "a search of *that log* has been conducted, and no accident has been identified to the time period *in that log.*" *Id.* (quoting June 4 Tr. at 50) (emphasis added). As is confirmed by later testimony, these statements were *not* references to the Svede log (of which Mr. Means was unaware at that time), but were references to the only log known to him at that time, the separate one maintained by Postal Service employee Robert Kunkel, of the Safety Office. *See* July 28, 1992, Tr. at 15-17, 31-32, 40-41, 46-47. The record is undisputed, moreover, that the Kunkel Safety Office log in fact did *not* contain any entry regarding plaintiff's accident. *Id.* at 31-32. Accordingly, Mr. Means' statements to the district court about the content of the "logs" were truthful,[4] to the best of his knowledge, because he did not know about the existence of the second set of logs until Mr. Svede produced them immediately prior to the afternoon session of the June 4 hearing, and because Mr. Svede had

[4] The mere facts that Mr. Means referred to "logs" by no means implies that he was referring to *both sets* of logs. A single set of "logs" is often referred to in this manner in common parlance, and indeed the Kunkel/Safety Office "logs" were referred to in this manner elsewhere in the proceedings below. *See, e.g.*, July 28 Tr. at 16-17, 48-50.

previously told him that there were no references to the subject accident in any other documents kept by the Postal Service. *See* July 28 Tr. 17-18, 24-25, 38-39, 51.[5]

By urging the Court to reconsider the evidence on this point, we by no means seek to excuse the non-production of the second log. There is no question that it was called for and should have been produced in a timely manner. We recognize, moreover, the inescapable conclusion that there was fault in not locating and producing this document. Had Mr. Means and Mr. Svede both taken proper care in carrying out their discovery obligations, the second log should have been produced. We respectfully submit, however, that the weight of evidence is strongly against any conclusion that Mr. Means engaged in the sort of "intentional[] withholding [of] documents" or "blatant misrepresentations to the district court" that this Court's opinion takes as established. *See, e.g.*, slip op. at 532.

3. Another document that has been the source of dispute is an accident report form, Postal Service Form 1769, that plaintiff claims to have filled out. The record before the district court as to whether or not such a docu-

[5] In its evaluation of this point, the district court also made reference to the government's earlier written response to plaintiff's motion for sanctions, in which the government had referred to Mr. Svede's "own log." *See* July 28 Tr. at 74-75, 86-87; *see also* slip op. at 526 & n.11. The use of such language did not imply, however, that government counsel knew of the Svede log at that time. On the contrary, Mr. Means explained in the court below that the quoted language was used as a direct response to (and paraphrase of) plaintiff's objections, which Mr. Means believed to be in error. *See* July 28 Tr. at 57-60. Indeed, a fair reading of the pertinent portions of the government's written response is entirely consistent with Mr. Means' explanation to the court—*i.e.*, that he had carefully inspected the Kunkel/Safety office log and found them void of relevant accident reports and thus not to be responsive to plaintiff's request, but that he was unaware of the existence of the separate Svede log. *See* Defendant's Response: Plaintiff's Supplemental Motion for Sanctions, June 3, 1992, at 10-13, 23-24, R. 332-35, 345-46.

ment existed was admittedly in dispute. However, the district court made no express findings of fact on this point, nor did it place any specific reliance on this point in drawing its ultimate conclusions and imposing sanctions. *See* June 4 Tr. at 144-53.

In its discussion of this issue, this Court appears to be of the view that the existence of this document was established beyond question. With respect, we submit that the record does not bear out such a conclusion. We recognize that plaintiff herself testified that she filled out such a form and returned it to Postal Service employee Iona Smith. June 4 Tr. at 112. Ms. Smith, however, denied any knowledge of plaintiff's having done so. *Id.* at 85-86. Mr. Svede *initially* testified (as this Court has noted) that he had a copy of this form. *See* slip op. at 527; June 4 Tr. at 93. Shortly thereafter, however, Mr. Svede indicated that, although he thought that he had seen such a form, he was in fact unsure about this and could not now produce it. *Id.* at 100.

The record thus leaves questions unanswered, and Mr. Svede's testimony is, on its face, puzzling. Witnesses do, however, at times become confused, and the district court is best positioned to evaluate such matters, since it can observe the demeanor of witnesses. *See National Surety Corp.* v. *Musgrove*, 310 F.2d 256, 262 (5th Cir. 1962) ("This Court cannot, however, review the evidence and make findings de novo, especially in a case such as this one in which much depends upon the demeanor of the witnesses"), *cert. denied*, 375 U.S. 974 (1964); *see also United States* v. *Best*, 939 F.2d 425, 431-32 & n.3 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992). Despite the district court's other criticisms of government counsel, it made no specific findings on this point. We submit that the highly equivocal record on this point [6] provides no support for any conclusion that coun-

[6] Apart from Mr. Svede's apparent confusion, there remains the apparent dispute between plaintiff's testimony and that of the

sel engaged in willful or contumacious behavior. Indeed, there is absolutely no implication in the record that Mr. Means had even seen or possessed such a document, nor misrepresented any fact about such a form.

4. In short, despite the acknowledged, serious lapses in the government's response to plaintiff's discovery requests, we respectfully urge the Court to reconsider whether the record truly compels a conclusion that those lapses were "patently willful and contumacious." *See* slip op. at 532. When one considers the fact that there were two sets of logs (one of which unquestionably contained no information relevant to plaintiff's discovery requests), the nonprobative nature of the second log found to have been "withheld" (*see* E.R. 63-66), and the ambiguous record regarding the existence of any accident report form filled out by plaintiff, it becomes apparent that there is another plausible explanation for the events at issue—in our view, a far *more* plausible explanation. That is that there was a failure to respond timely to discovery, an inadequately thorough search for documents, and then a good deal of confusion and carelessness, which prevented the trial counsel from learning of the document earlier.

As we have stated previously, we do not seek to excuse such carelessness or ask the Court to condone it. We submit that there is legitimate question, however, as to whether such errors of carelessness should lead to the rather severe

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Postal Service employee. There are, however, at least two possible explanations for this. One is that plaintiff was mistaken in her recollection of having filled out such a form. Another is that she did so, but that the Postal Service lost the form at some time between receiving it in 1988 and searching its files in response to the discovery request in 1992. Regardless of which of these possibilities in fact represents the truth (an issue that the district court did not resolve), *either* possibility belies the notion that the government (particularly government counsel) has willfully withheld a document in its possession, which we continue to insist is not the case.

sanctions imposed here.[7] Moreover, even if the Court should determine that the sanctions imposed are to be affirmed regardles of whether the misconduct was the result of carelessness or dishonesty, we respectfully ask the Court to amend its opinion in light of the significant considerations discussed above. As the Ninth Circuit has observed, "published opinions chastising [counsel] by name" constitute a "serious sanction." *See United States* v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). We therefore respectfully submit that, even if the Court is disinclined to alter its affirmance of the sanctions ordered by the District Court, it should correct the factual errors in its opinion, in accordance with the presentation made above.

5. Finally, we request that the court alter the portion of its opinion taxing attorney's fees against the government for the present appeal. *See* slip op. at 538. Although the Court did not specify the exact basis for this award, we assume that it was made pursuant to 28 U.S.C. § 2412(b), in conjunction with Fed. R. App. P. 38 and/or 28 U.S.C. § 1912.[8] We recognize that attorney's fees

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[7] The Court is quite right that the sanctions order left the United States free to pursue affirmative defenses and to contest the amount of damages, and we have never intended to convey a contrary impression. *See* slip op. at 529. Under the actual circumstances of this case, however—where we had little to offer by way of affirmative defenses; where it was unquestioned that plaintiff's fall resulted in substantial harm to her; but where we believed that any evidence of negligence by the Postal Service was quite weak—the *real* effect of the order was to deprive the government of its only realistic chance for a favorable outcome in this litigation—namely, the requirement that plaintiff prove liability.

[8] The more frequently invoked portion of the Equal Access to Justice Act, 28 U.S.C. § 2412(d), expressly excludes "cases sounding in tort" from its authorization of fee awards. 28 U.S.C. § 2412(d)(1)(A). This limitation doubtless reflects the fact that counsel for plaintiffs in tort cases generally receive ample compensation from contingency fee arrangements—particularly where, as here, the judgment won is substantial.

may at times be a proper element of "damages" under the latter two provisions, but only where the appeal was *frivolous*. *See Self* v. *Self*, 614 F.2d 1026, 1028 (5th Cir. 1980); 9 *Moore's Federal Practice* ¶ 238.02[1] (1993). For all of the reasons set forth above, we submit that the present appeal was not frivolous, and that there should be no separate award of fees to plaintiffs for defending it.[9]

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[9] The Federal Tort Claims Act, under which the present action was brought, imposes mandatory limitations on the percentage of the judgment rendered that counsel may collect in fees. 28 U.S.C. § 2678. Even if the Court determines, contrary to our arguments, that an award of fees on appeal is appropriate, it may wish to clarify that the total amount of fees received by counsel may nevertheless not exceed the amount permitted under this provision.

CONCLUSION

For the foregoing reasons, appellants respectfully urge the Court to reconsider its ruling in this case, reverse the sanction imposed upon the United States, and remand for trial on the issue of liability. In the alternative, appellants ask the Court to amend its opinion, in light of the lack of evidence in the record of willful or contumacious misconduct. We also request deletion of the portion of the Court's opinion awarding attorney's fees on appeal.

Respectfully submitted,

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DECEMBER 1993

[Certificate of Service Omitted in Printing]

MOTION FILED
MAY 23 1994

No. 93-1663

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RANDELL P. MEANS,
Petitioner,

v.

BRENDA CHILCUTT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Federal Bar Association respectfully requests leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for respondent Brenda Chilcutt has refused consent.

The Federal Bar Association is a nationwide organization with more than 14,500 attorney members. The majority of association members have at some time in their professional careers served in the public sector.

Approximately 2,800 members are presently government attorneys, and the remainder are in private practice or other pursuits. The association's members share a common interest in federal practice.

The Federal Bar Association has a direct interest in this case. As one publication recently noted, the instant case, while beginning as a "small and routine slip and fall case . . . grew into one of the more significant judicial ethics decisions in recent years" and "has wide implications for government lawyers." *Pass It On: Newsletter of the Government and Public Sector Lawyers Division* (American Bar Association), Vol. 3, No. 3 (February/April 1994), at 7. The Federal Bar Association is troubled that the findings of intentional attorney misconduct in this case were made in a procedurally defective and unfair manner, and that the inappropriate appellate fact finding at issue here does not appear to be an isolated occurrence in cases involving alleged attorney misconduct. In the view of *amicus,* the need for strict adherence to proper procedures, and respect for the differing roles of trial and appellate tribunals, is particularly acute where, as here, a lawyer has been accused of intentional misconduct. Such allegations pose a risk of serious, even devastating, personal and professional consequences. It is, therefore, imperative that the courts of appeals not overstep the bounds of appropriate appellate review.

The Federal Bar Association is also concerned that decisions such as the one at issue here may exert an inappropriate chilling effect on attorneys evaluating whether to seek appellate review. If an attorney may be subjected to sanction, and personal vilification, on the basis of factual findings made in the first instance by an appellate tribunal, that attorney may well feel pressure not to pursue an otherwise meritorious appeal.

On behalf of its government employee members, the Federal Bar Association also has a direct interest in the question whether a federal court may properly forbid the

Department of Justice from reimbursing one of its employees for sanctions imposed pursuant to Federal Rule of Procedure 37. Allowing federal courts to limit reimbursement by the Department of Justice raises serious sepration of powers concerns. In this case, the court of appeals believed its finding of intentional misconduct removed any need for serious consideration of these separation of powers issues. If, as we request, the finding of intentional misconduct is vacated, this important separation of powers issue will receive a proper airing on remand. More broadly, the Federal Bar Association is concerned that judicial orders forbidding reimbursement of an attorney by his or her employer should be imposed only in special circumstances where intentional misconduct has been clearly proven.

For all the foregoing reasons, the Federal Bar Association respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The interest of *amicus* is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.

STATEMENT

This is an extraordinary case in which the United States Court of Appeals for the Fifth Circuit has affirmed the imposition of severe personal discovery sanctions upon an Assistant United States Attorney, Randell Means, on the ground that Mr. Means intentionally concealed inculpatory evidence during discovery in a civil case. The district court, however, made no findings of intentional concealment—or any other intentional wrongdoing—and the independent findings made by the appellate panel in

support of its result are demonstrably wrong in critical respects. To make matters worse, the court of appeals' published opinion contains an unusually harsh and inflammatory personal rebuke of Mr. Means. Pet. App. 17a-18a. Because the court of appeals departed so far from the accepted course of judicial proceedings, and produced so manifestly unjust a result, the Federal Bar Association joins petitioner in urging summary reversal of the decision below.

The facts of the case are ably set forth in the petition for certiorari. The key points are as follows:

1. The district court's decision to sanction Randell Means *did not* rest on any factual finding that Means intentionally withheld information during discovery or misrepresented facts to the court. Indeed, the district court's decisions to impose a monetary sanction on Means, to forbid Means from seeking reimbursement for payment of that sanction, and to designate certain facts as proven (all pursuant to Federal Rule of Civil Procedure 37) were rendered more than a month *before* the district court even held a hearing as to whether Means had intentionally withheld information.

2. Upon concluding a subsequent evidentiary hearing into whether Means had intentionally concealed information during discovery, the district court decided that it would give Means "the benefit of the doubt," and *did not find intentional concealment*. Pet. App. 116a. The district court specifically found that a witness whose testimony exonerated Randell Means from any intentional concealment was "basically being honest." Pet. App. 114a.

3. Far from showing intentional concealment, the district court record reveals a plausible explanation for the discovery lapses at issue: confusion resulting from the existence of *two* separate accident logs. The log Randell Means reviewed did not, in fact, contain information responsive to plaintiff's discovery request. The other log

at issue did contain such information, but Mr. Means was unaware of the existence of that log until *after* he had made representations to the district court about the contents of the logs at issue. The custodian of that log testified at length that he did not make its existence or contents known to Randell Means until he arrived at the courthouse for the afternoon session of the hearing on June 4, 1992, at which he produced the log in question.

4. The court of appeals plainly did not rest its ruling on the district court's findings of fact. Nor did it conclude that the district court's findings were clearly erroneous in any respect. Instead, the Fifth Circuit made its own independent findings, based on what it described as "credible evidence in the record." Much of that evidence was testimonial in nature, and the appeals court's conclusions specifically required it to make credibility determinations.

5. At least two of the critical factual "findings" on which the appeals court's opinion rests are demonstrably wrong. First, the court of appeals wrongly concluded that Randell Means had misrepresented the contents of the accident logs. Second, the court of appeals wrongly concluded that Randell Means intentionally concealed the existence of a "Form 1769." There was some conflict in the record as to whether the respondent in this case, Brenda Chilcutt, ever filled out such a form. But the government employee responsible for maintaining these forms expressly testified that no such form was in the files. The district court made no finding that such a form existed, and thus made no finding that Means intentionally concealed, or even failed to produce, such a form.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and summarily reverse the decision below. *Amicus* recognizes that this case does not present any unsettled legal issue warranting full briefing and argument. Nevertheless, the Fifth Circuit's decision so far departed from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is warranted to correct the appeals court's departure and ameliorate its excessively harsh consequences. *See* Supreme Court Rule 10.1(a).

It is beyond dispute that a United States Court of Appeals lacks the competence and authority to engage in independent fact finding. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986); *Amadeo v. Zant*, 486 U.S. 214 (1988). Indeed, *de novo* appellate fact-finding may well exceed the jurisdiction conferred by 28 U.S.C. § 1291, which extends only to "appeals from final decisions of the district courts."

Unfortunately, improper appellate fact finding would appear to occur with some frequency in cases involving alleged attorney misconduct. *E.g., United States v. Tarricone*, No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994) (vacating panel's prior finding of prosecutorial misconduct and remanding to district court); *United States v. Best*, 939 F.2d 425 (7th Cir. 1991) (en banc) (vacating panel finding of misconduct by Assistant United States Attorney, and remanding to district court), *cert. denied*, 112 S. Ct. 1243 (1992); *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (panel finding of misconduct by Assistant United States Attorney), *cert. denied*, 484 U.S. 963 (1987). Doubtless this phenomenon reflects good intentions. Appellate judges in particular may feel a sense of responsibility for policing professional ethics, as well as a growing frustration with the corrosive effects of overly aggressive advocacy. Nevertheless, appellate judges are no better equipped to make *de novo*

factual determinations in attorney misconduct cases than they are in any other.

To the contrary, the rule against appellate fact finding should apply with particular force where, as here, allegations of professional misconduct have been made. *First*, as this case amply demonstrates, allegations of attorney misconduct will often turn on issues of credibility and motive—issues that appellate tribunals are particularly ill suited to resolve. Deciding whether failure to produce discoverable information was the result of oversight or intentional concealment will typically require an assessment of counsel's credibility. Such disputes will also require a court to sort out disparate and potentially conflicting testimony as to who was responsible for failing to produce a document. Though counsel is ultimately responsible for ensuring compliance with discovery requests, counsel will typically discharge that responsibility with the substantial assistance of the client's employees. Where more than one individual participates in the process of responding to discovery requests, allegations of intentional concealment can be resolved only by determining which individual participants in the discovery process, if any, are ultimately at fault.

Second, the stakes are especially high in attorney misconduct cases. Erroneous factual determinations not only result in wrong decisions on the merits, but may also have devastating and irreparable consequences for the professional reputations of practicing attorneys. A finding of intentional misconduct is serious business. As the Ninth Circuit has recognized, "published opinions chastising [counsel] by name" constitute a "serious sanction." *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). "Public criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation." Kauf-

man, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 864 (1989).

United States v. Ofshe illustrates the risks. In that case, in the course of finding prosecutorial misconduct, the appeals court gratuitously labelled as "reprehensible" the conduct of an Assistant United States Attorney. The prosecutor filed a motion with the Eleventh Circuit asking it to remove the footnote addressing the ethics of his conduct, and arguing that the public censure, without notice, violated his right to due process. (11th Cir. Docket No. 86-5351.) The court responded with an unreported opinion which, while determining that the prosecutor had no standing to make the motion, nevertheless, and without affording him any opportunity for a hearing, characterized his conduct even more harshly. Further, while the original opinion encouraged the district judge to report the prosecutor to his bar disciplinary commission, the second opinion "expressly invited . . . indictment . . . for the crime of obstruction of justice." *See* Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. Pa. L. Rev. 1879 (1988).

Subsequently, the Public Integrity Section of the Department of Justice determined there was no probable cause to prosecute, and the Illinois Supreme Court Attorney Registration and Disciplinary Commission dismissed its investigation of the attorney's conduct. *See* Kaufman, *supra*, at 865-66. "When the state disciplinary authorities decided to dismiss their investigation, however, there was no public notice of that at all. The only item of public record is the Court of Appeals' negative comment." *Id.* Observing that the Assistant United States Attorney in that case was "without recourse," one commentator noted that

> Instructed by experience, he will surely not petition the same court . . . . So without notice, without an opportunity to be heard, and without access to a

> reviewing tribunal, Turow's professional reputation is impugned for lawful behavior, in accord with the policy of his office and the Department of Justice, undertaken in the interests of law enforcement. In effect, a panel of the Court of Appeals for the Eleventh Circuit sat as a grand jury, voted a true bill, and Turow, without a trial forum, will be forever presumed guilty.

Uviller, 136 U. Pa. L. Rev. at 1901.

Petitioner Randell Means was victimized in precisely this way. The Fifth Circuit pronounced a scathing indictment, finding that he "flagrantly and willfully disregarded . . . discovery obligations," "intentionally with[held] documents," and made "blatant misrepresentations to the district court." Pet. App. 17a-18a. These accusations were, as demonstrated in the petition for certiorari, without foundation in the district court's findings, or even the record evidence. The appeals court's willingness to reach these conclusions on the basis of its own evaluation of the record evidence—which consisted principally of witness testimony—deprived Means of even the rudiments of fair process.

In analogous circumstances, the Court has recognized that allegations of attorney misconduct involve:

> adversary procedures of a quasi-criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended.

In re Ruffalo, 390 U.S. 544, 551 (1968). Appellate court fact finding in the circumstances of this case brings about the same result because it effectively changes the nature of the "charges" of attorney misconduct at issue, after briefing has been concluded, and after the attorney has any meaningful opportunity to present a complete factual and legal defense to the charges.

Summary reversal is all the more warranted here because the Fifth Circuit could have invoked appropriate

procedural options available to explore any qualms the panel may have had about intentional wrongdoing or contumacious conduct. The court could have remanded to the district court with instructions to make factual findings, or the court could have recommended referral to the state bar disciplinary committee. That is precisely the course other courts of appeals have followed when, upon reflection, they determined that their prior conclusions respecting attorney misconduct lacked a sufficient record foundation. *E.g., United States v. Tarricone,* No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994) (vacating panel's prior finding of prosecutorial misconduct and remanding to district court); *United States v. Best,* 939 F.2d 425 (7th Cir. 1991) (en banc) (vacating panel finding of misconduct by Assistant United States Attorney, and remanding to district court), *cert. denied,* 112 S. Ct. 1243 (1992).

Summary reversal will also ameliorate other disturbing features of the Fifth Circuit's decision. Particularly given the publicity it has received, that decision may well exert an inappropriate chilling effect on attorneys evaluating whether to seek appellate review. If an attorney may be subjected to sanction, and personal vilification, on the basis of factual findings made in the first instance by an appellate tribunal, that attorney may well feel pressure not to pursue an otherwise meritorious appeal—pressure that may well give rise to conflicts of interest between counsel and client.

Furthermore, as a result of its improper findings of intentional misconduct, the Fifth Circuit never came to grips with important questions as to the propriety of forbidding Randell Means from being remibursed for the monetary sanctions imposed. Allowing federal courts to limit reimbursement by the Department of Justice raises serious separation of powers concerns, particularly where intentional misconduct is not found. Constitutional questions aside, there are serious issues whether it is within a

district court's discretion to forbid reimbursement for sanctions absent a finding of intentional misconduct. Forcing an individual attorney to bear such costs—which may well be severe—for conduct in the course of employment is a particularly draconian sanction that should be reserved only for the most egregious cases of misconduct—cases far removed from the one at hand.

CONCLUSION

The petition for certiorari should be granted and the decision of the court of appeals should be summarily reversed.

Respectfully submitted,

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MOTION FILED
MAY 20 1994

(3)

No. 93-1663

In The

Supreme Court of the United States

October Term, 1993

RANDELL P. MEANS, Assistant United States Attorney, in his individual capacity,

Petitioner,

v.

BRENDA CHILCUTT, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Dated: May 20, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

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Pursuant to Rule 37.2 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of the petition for a writ of certiorari. Petitioner and respondent United States[1] have consented to the filing of this brief. This motion is made necessary

[1] The United States, a defendant below, has not filed a petition for a writ of certiorari on its own behalf, and is therefore a respondent in this Court under S. Ct. Rule 12.4.

by the refusal of respondent Brenda Chilcutt's counsel to provide consent.

The National Association of Assistant United States Attorneys ("NAAUSA") is a nonprofit corporation organized under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. NAAUSA is a professional, non-governmental association with the primary objective of promoting and protecting the career and professional interests of Assistant U.S. Attorneys. Currently, NAAUSA has over 800 members with representatives in every United States Attorney's Office.

NAAUSA serves as a resource for policymakers in both the executive and legislative branches and helps to educate them with regard to important issues that concern its members. Since its incorporation in 1992 NAAUSA has become involved in a number of policy debates affecting the federal law enforcement community, including compensation and pension issues, absolute immunity protection and federal legislation dealing with crime.

The National District Attorneys Association ("NDAA") is a professional association of prosecuting attorneys headquartered in Alexandria, Virginia. NDAA currently has over 7,000 members, including prosecutors, assistant prosecutors, investigators and paralegals. NDAA provides professional guidance and support to its members, serves as a resource and education center and produces a number of publications, including *The Prosecutor* magazine.

The research arm of NDAA, the American Prosecutors Research Institute ("APRI") operates five centers: the APRI Research Center, the National Drug Prosecution Center, the National Center for Prosecution of Child Abuse, the National Environmental Crime Prosecution Center, and the National Traffic Law Center. Each center provides prosecutors with research expertise, technical assistance, and professional training seminars.

Both NAAUSA and NDAA have a strong interest in the outcome of this case. Given the controversial cases in which government counsel may often find themselves, fact-finding by appellate courts concerning alleged attorney misconduct and interference by appellate courts with the operation of government indemnification mechanisms create a unique hazard for government counsel, chilling their good faith and their energetic representation of the public interest in judicial proceedings. Though improper in itself as a matter of law, such action also unfairly offends the most rudimentary sense of fairness, for it irreparably harms a prosecutor's professional reputation without notice or providing an opportunity to present a defense. Moreover, because of their nationwide scope and participation in the judicial process, *amici* are in a unique position to aid this Court in its understanding of the increasingly systemic and recurrent character of appellate fact-finding in this context and the deleterious effect of such appellate fact-finding on both individual prosecutors and the judicial system.

Accordingly, *amici* respectfully request that their motion for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari be granted.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of the *amici* is set forth in the motion accompanying this brief.

REASONS FOR GRANTING THE PETITION

The National Association of Assistant United States Attorneys ("NAAUSA") and the National District Attorneys Association ("NDAA") support the petition for a writ of certiorari of Assistant United States Attorney

Randell P. Means and join with him to urge this Court to reverse summarily the judgment below and remand the case for further proceedings. We feel compelled to add our voices to this petition because, as petitioner has candidly observed, Pet. 17,[2] by many familiar measures this case might not be viewed as meriting the attention of the Court. Indeed, the impulse to draw such a conclusion illustrates in part the problem that makes summary reversal and remand so appropriate here. For this case presents a clear example of an increasingly recurring and egregious abuse by courts of appeals. This abuse irreparably scars the professional reputation of government counsel without notice, violates with impunity a settled rule of law governing the conduct of appellate judges and intrudes into the operation of a coequal branch of the government. By its very nature, however, this abuse is often not apparent in case reports and defies redress anywhere but in this Court.

To be sure, the abuse at issue here is not the sanctioning of a particular government attorney for his lack of diligence in timely responding to civil discovery. Rather, in affirming the district court's order barring a petitioner from seeking reimbursement of that sanction under a Department of Justice procedure, the court of appeals engaged in fact-finding that was undeniably improper, remarkably inflamed and wrong. *See* Pet. 19-22; Pet. App. 121a-133a.[3] As a result, the court of appeals erroneously branded the conduct of petitioner "patently willful and contumacious." Pet. App. 18a.

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[2] "Pet." denotes the Petition for a Writ of Certiorari.

[3] "Pet. App." denotes the Appendix to the Petition for a Writ of Certiorari.

This case involves more than merely the injustice visited upon one Assistant United States Attorney, for the Fifth Circuit has joined a number of appellate courts that are apparently willing to indulge in fact-finding when government counsel have been accused of misconduct. Such unexpected and summary treatment of so serious a matter that strikes so directly at a lawyer's professional standing has had a profound impact on government attorneys throughout the country. Yet the nature of this issue makes it one that will never appear as a conflict between the circuit courts. Precisely because the law is clear that appellate courts must not find facts, it is likely that courts that do so will either do so inadvertently or without admitting it. The subterranean nature of the problem does not make the impact any less severe, but it does mean that this Court is the only place where it can be corrected.

1. Appellate fact-finding in the context of attorney misconduct is an increasingly systemic and pernicious problem that harms and frustrates individual attorneys and corrupts the judicial process. This Court has explicitly and emphatically stated that an appellate court should not make factual findings on its own. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). As the Court explained in *Icicle*, if the court of appeals believes that a district court has failed to make findings of fact essential to a proper resolution of the legal question, it should remand the case to the district court to make those findings. If it is of the view that the findings of the district court were "clearly erroneous" within the meaning of Rule 52(a), it should set them aside on that basis. *See* Fed. R. Civ. P. 52(a). And if it believes that the district court's factual findings were unassailable, but that the

proper rule of law was misapplied to those findings, it should reverse the district court's judgment. But actually making findings of fact is not an option the law gives to an appellate court. *Id.*

An appellate court's power to find facts is so circumscribed in large measure because it does not have "the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence," *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 855 (1982), which is the "special province" of the trier of fact. *Id.* at 856. Consequently, a court of appeals "clearly err[s]" when it rejects a district court's findings merely because it would have given more weight to certain evidence than did the trial court. *Id.*

The court of appeals has plainly engaged in fact-finding in this case. After an extensive hearing on the issue, the district judge clearly stated – twice – that he was giving Mr. Means the "benefit of the doubt." Pet. App. 116a, 119a. The district court's written order also declined to decide "whether the conduct was intentional or grossly negligent." Order of July 28, 1992 in *Chilcutt v. United States*, No. 4:91-CV-277-A (N.D. Tex. July 28, 1992); Pet. App. 53a. Disregarding the district court's explicit statement and the absence of any finding of willfulness, the court of appeals went beyond the district court and found that petitioner's conduct was willful, contumacious and flagrant. Pet. App. 22a. Moreover, the court of appeals based its ultimate finding of willfulness on a confused reading of the record. *See* Pet. 19-22.

We understand that this Court does not sit merely to correct errors made by an inferior court. But the issue presented by petitioner is not unique to this case or to the Fifth Circuit. As serious as this matter is for Mr. Means, it

is part of a problem that we see becoming systemic and that has grave implications for government attorneys throughout the country and for our judicial system. Put simply, a number of courts of appeals appear to believe that it is their special province to find facts beyond those determined by the trial court in cases dealing with attorney misconduct. It is unclear whether the courts of appeals have consciously decided that it is their duty to find facts in this context, or whether this fact-finding is a result of a natural, but unconscious, temptation to reach out to address what appellate courts deem to be a lack of integrity in the system.

Whatever the reason, the blatant factual errors made by the court of appeals in this case clearly demonstrate why appellate courts are not suited to make findings of fact – there is a great risk they will get the facts wrong. Sadly, when they do get it wrong, the harm, in both human and legal terms, is irreparable.

A career as a government attorney represents a personal commitment of one's professional life to public service. Although it is a profound honor to represent the people in court, that honor is inextricably linked to a weighty responsibility, a responsibility to meet the highest standards of professional conduct at all times. For if we fall short of that standard – no matter how unintentionally – the people are not well-represented and the public interest is not well-served. This is why we do not object when one of our number falls short of this standard and is *appropriately* sanctioned.

But an inappropriate sanction, particularly one, as here, that rests on a gross mischaracterization of the government attorney's conduct, wrongly tells the world that the government attorney failed to do his or her duty

properly and represented the people dishonorably. It may cause incalculable harm to the reputation and emotional well-being of the attorney, and the attorney has little recourse to defend his or her conduct and mitigate the harm. With an inappropriate sanction, the court thus strikes directly and unjustly at the very heart of a career government attorney.

As a practical matter, it cannot be doubted that "[p]ublic criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation." Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 864 (1989) [hereinafter *Judicial Ethics*]. In contrast, labeling an attorney's conduct as contumacious or reprehensible may have little impact on the actual litigant, who may be unwilling to appeal or petition for rehearing on that basis. Indeed, because statements about the conduct of the attorney may not affect the rights of the parties, an appellate judge may feel that labeling the attorney's conduct without any similar finding by the district court is not a serious problem.[4]

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[4] In addition, fact-finding by a court of appeals reduces the analysis by the federal government of whether to appeal a case to hopeless speculation. No longer can anyone trust that all the fact-finding on which a legal conclusion might rest has been completed by the district court. Moreover, the individual government attorney must recognize the possibility that his or her professional reputation could be placed in jeopardy. The individual attorney is thus presented with a conflict between the duty to represent the client and the impulse to safeguard one's professional reputation.

Professor Kaufman cites a "good example" of a case where the appellate court "did serious injury to a lawyer's reputation in a proceeding in which he never appeared as a party." *Judicial Ethics, supra,* at 864, 866. In *United States v. Ofshe,* 817 F.2d 1508, 1516 n.6 (11th Cir.), *cert. denied,* 484 U.S. 963 (1987), the court of appeals called the prosecutor's conduct "reprehensible" and suggested that a bar disciplinary proceeding was in order. The prosecutor, Scott Turow,[5] moved to have the passage removed from the opinion. *Judicial Ethics, supra,* at 865. The motion was supported by a memorandum filed by the United States, stating that the conduct in question had been approved by the Department of Justice. H. Richard Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow,* 136 U. Pa. L. Rev. 1879, 1879-80 (1988) [hereinafter *Presumed Guilty*]. The court of appeals denied Mr. Turow's motion in an unpublished opinion. In that opinion, the court went beyond its earlier statement and found that Mr. Turow may well have obstructed justice in violation of 18 U.S.C. § 1503. *Presumed Guilty, supra,* at 1880; *Judicial Ethics, supra,* at 865. Moreover, the court expressly invited the indictment of Turow for the crime of obstruction of justice. *Presumed Guilty, supra,* at 1880. Subsequently, a one-page letter from the Public Integrity Section of the Department of Justice announced that there was no evidence that Mr. Turow violated any federal statute, and the Supreme Court of Illinois Attorney Registration and Discipline Commission informed Mr. Turow that it had dismissed its investigation. *Judicial Ethics* at

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[5] Mr. Turow has become well known as the author of numerous books, including *One L, Presumed Innocent* and *The Burden of Proof.*

865-66. Nevertheless, even after the state disciplinary authorities decided to dismiss their investigation, "[t]he only item of record [remained] the Court of Appeals' negative comment." *Id.* at 866. The unfairness of such judicial misconduct is apparent:

> [W]ithout notice, without an opportunity to be heard, and without access to a reviewing tribunal, Turow's professional reputation is impugned for lawful behavior, in accord with the policy of his office and the Department of Justice, undertaken in the interests of law enforcement. In effect, a panel of the Court of Appeals for the Eleventh Circuit sat as a grand jury, voted a true bill, and Turow, without a trial forum, will be forever presumed guilty.

Presumed Guilty at 1901.

Another case in which improper appellate fact-finding with regard to attorney misconduct has come to light in published reports is *United States v. Tarricone*, 996 F.2d 1414 (2d Cir. 1993). In *Tarricone*, the court of appeals remanded the case for an evidentiary hearing on an ineffective assistance of counsel issue. *Id.* On remand, one of the defendants claimed for the first time that the government had made knowing use of false testimony in securing his conviction. *United States v. Tarricone*, No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994). Because the case was remanded solely for consideration of the ineffective assistance claim, "the district court was not required, and indeed declined, to rule on the government's misconduct claim despite [the defendant's] arguments on this issue." *Id.* at *2. The court of appeals, however, made the finding on its own. It determined that "the only reasonable conclusion was that the . . . testimony was false and that the government knew or should have known that it was

false." *Id.* at *1. In the petition for rehearing, the government offered facts outside the record that bore on the question. The court finally admitted that the "evaluation of these facts is best left to the district court in the first instance" and expanded the scope of the remand so the district court could do so. *Id.*

It is true that an improper statement by an appeals court with regard to attorney misconduct may be corrected on remand. But correction on remand does not solve the systemic problem of appellate fact-finding. It is only because the court wrote an opinion on rehearing that we are even aware that the court had improperly found facts regarding attorney misconduct. If the court had failed to write an opinion on rehearing, the wrong would never have come to light. For example, in *United States v. Best*, 939 F.2d 425 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1243 (1992), improper appellate fact-finding came to light only after a rehearing *en banc* when the court observed in a footnote: "On this question we note that the *findings* of the original panel in this case that suggested that Assistant United States Attorney Susan Bogart, the lead prosecutor in this case, had 'quite possibly' engaged in misconduct have been vacated. Had the district court believed an inquiry into Ms. Bogart's conduct warranted, it could have conducted one; we should not perform that task in its stead." 939 F.2d at 431-32 n.3 (emphasis added). Improper fact-finding in this context is, by its very nature, a difficult problem to ferret out; but it is no less important because of this difficulty.

Petitioner's case gives this Court the opportunity to state forcefully and in no uncertain terms that the prohibition on appellate fact-finding applies in the context of attorney misconduct in the same way that it does in any

other context. Although the nature of this issue makes it difficult to discern each instance in which a court of appeals improperly has found facts, there are a sufficient number of instances of courts of appeals doing so to evidence that this is a systemic problem. Because of the serious harm that occurs when appellate courts improperly find facts regarding attorney misconduct, this Court's intervention is warranted.

2. Summary reversal and a remand of this case for further proceedings is further warranted by the important separation of powers issue created by the district court's injunction, an issue that has been made vastly more troublesome by the confusion of the facts by the court of appeals. The doctrine of separation of powers – "the heart of our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) – reflects the fact that the design of the Framers was not simply to fashion an efficient government, even in the pursuit of worthwhile goals, but to "diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Consequently, "the Court has been sensitive to its responsibility to enforce the principle when necessary." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298, 2310 (1991). Indeed, the Court has emphasized that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.' " *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley*, 424 U.S. at 123).

As part of this "diffused" design, the Constitution assigns "[t]he executive Power" to the President, U.S. Const. art. II, § 1, and charges the President to "take Care that the Laws be faithfully executed." art. II, § 3. The President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity . . . [that] include . . . management of the Executive Branch. . . . " *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). At the same time, the Constitution prohibits judges from performing "executive or administrative duties." *Buckley*, 424 U.S. at 123; *see also Muskrat v. United States*, 219 U.S. 346, 355 (1911) (Article III courts must "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.").

The President's responsibility to supervise and manage the personnel of the Executive Branch surely is a most fundamental expression of the executive power. After all, the Executive Branch has no existence apart from the men and women who work in it; those public servants *are* the Executive Branch. *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he president alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").[6] More

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[6] Put another way, in the words of James Madison, "I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Congress* 481 (1789); *see also* The Federalist No. 72, at 487 (Hamilton) (J. Cooke ed., 1961) ("The persons . . . to whose immediate management [the government is] committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment . . . and ought to be subject to his superintendence.").

specifically, the Attorney General "is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings . . . be faithfully executed." *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). Moreover, Congress has mandated that "the Attorney General shall supervise all litigation to which the United States . . . is a party, and shall direct all United States attorneys, Assistant United States attorneys, and Special Attorneys . . . in the discharge of their respective duties." 28 U.S.C. § 519.

As part of these responsibilities, in 1986 the Attorney General changed the policy of the Department of Justice to allow the Department to reimburse Department employees against whom sanctions are entered as a result of acts taken within the scope of their employment, when the Attorney General determines that such reimbursement is in the interests of the United States. 28 C.F.R. § 50.15(c). The Attorney General gave several reasons for this indemnification mechanism.

First, the Attorney General pointed out that in "most state and local governments and general corporate practice" employees are indemnified if they suffer an adverse monetary award as a result of actions taken in carrying out their duties. 51 Fed. Reg. 27,021, 27,022 (1986). Of concern, to be sure, were the "detrimental consequences [of a monetary award] for the federal employee, both pecuniary and otherwise." *Id.*

But the Attorney General went on to explain that, more importantly, this step was taken in the public interest to remove "a major impediment to the effective conduct of the public's business and enforcement of the law." *Id.*

> Of greater consequence to the federal government . . . is the fear of personal liability, because it is this concern which affects governmental operations, decision making, and policy determinations. The prospect of personal liability, and even the uncertainty as to what conduct may result in a lawsuit against the employee personally, tend to intimidate all employees, impede creativity and stifle initiative and decisive action. As Professor Kenneth Culp Davis has noted, "The public suffers whenever a government employee resolves doubts in order to protect his own pocketbook instead of resolving doubts in order to protect the public interest."

Id. (quoting K. Davis, *Constitutional Torts* 25 (1984)).

By its order permanently enjoining petitioner from applying under this policy for reimbursement of the discovery costs awarded against him, the district court intruded into the internal operations of the Executive Branch and in effect usurped the Attorney General's authority to determine whether indemnification of petitioner was in the interests of the United States.

Yet, in fairness, this obvious violation of the separation of powers by the injunction cannot be characterized so starkly. Petitioner was sanctioned in this manner under the express terms of Fed. R. Civ. P. 37(d), pursuant to which counsel for a litigant may be required to pay the reasonable expenses of an opponent caused by that litigant's failure to respond to discovery. Moreover, "[t]he ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987); *see also*

Fed. R. Civ. P. 11(c) (sanctions may be imposed on the attorneys of litigants).

Thus, two important values in the law, significant and legitimate interests of two coequal branches of the government, are put at loggerheads by the injunction at issue here. This Court has not addressed a conflict of the kind posed by this case.

We believe, however, that established principles of law lead inexorably to the conclusion that such an injunction is a violation of the constitutional separation of powers and is thus beyond the power of the judiciary. The United States is not, after all, just any litigant but part of the Executive Branch of the federal government and is thus of equal stature with the judiciary. The fact that distinct rules might govern the power of a court to sanction the government or its counsel is hardly a radical proposition in our constitutional order. Indeed, it must be remembered that the inability of a court to issue such an injunction does not in any way disable a court from ordering monetary sanctions, and thereby vindicating the judicial interests at stake. The Attorney General's indemnification policy is obviously not designed to permit an individual attorney who fails to live up to the high standards of professional conduct expected of government counsel to escape the consequences of his or her behavior. Even if ultimately indemnified, being the subject of such a sanction is no minor matter and does have a profound effect on the attorney involved.

Moreover, the supervisory power of a court to punish misconduct in the context of judicial proceedings has never been unfettered. Even the imposition of a sanction for criminal contempt is constrained by the rule that

"only 'the least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)). Different procedures must be followed to punish out-of-court, as opposed to in-court, contempts. *Young*, 481 U.S. at 798-99; *see also Bloom v. Illinois*, 391 U.S. 194, 202-08 (1968) (reviewing constitutional and other limitations on the judicial contempt power); Fed. R. Crim. P. 42 (The prosecution of contempt occurring out of the presence of the court may proceed only on notice, with a reasonable time for the preparation of the defense, and subject to other procedures.).

The doctrine of separation of powers is indisputably another restraint on the court's supervisory power:

> The judiciary does not "have a license to intrude into the authority, powers and functions of the [executive] branch[][,][for] [j]udges are not . . . executive officers, vested with discretion over law enforcement policy and decisions. . . . [T]he supervisory power . . . empower[s] judges to formulate procedural rules not specifically contemplated by Congress or the Constitution, [but] it does not justify a chancellor's foot veto over activities of coequal branches of government."

United States v. Jennings, 960 F.2d 1488, 1491 (9th Cir. 1992) (quoting *United States v. Simpson*, 927 F.2d 1088, 1089 (9th Cir. 1991)).

This view of the constraint imposed by the separation of powers reflects neither a simplistic nor an absolutist view of that doctrine. Rather, it follows from this Court's repeated caution that the separation of powers does not mandate "a hermetic division between the Branches." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). No

Branch is completely unfettered in any sphere of action. For example, the "Executive . . . cannot perform its function of enforcing the laws if Congress declines to appropriate the necessary funds for that purpose; or if the courts decline to entertain its valid prosecutions." *Young*, 481 U.S. at 817 (Scalia, J., concurring in the judgment). Likewise, the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.* at 818 (quoting The Federalist No. 78, at 522-23 (Hamilton) (J. Cooke ed., 1961)). Thus, the notion that a court simply cannot enjoin indemnification of a sanctioned government attorney fits comfortably within the established edifice of separation of powers law.

It is possible that the ultimate resolution by this Court of the conflicting interests underlying this important separation of powers issue may fall short of a complete bar to such an injunction. Petitioner here, for example, has suggested that separation of powers concerns might limit such an intrusion into Executive Branch operations when "willful misbehavior" is not involved. Pet. at 16 (citing *Blue v. Department of the Army*, 914 F.2d 525, 549 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991)).[7]

If such a position is to be considered fairly by this Court, however, the record that presents the issue to the Court must offer an accurate characterization of the sanctioned conduct. The error of the court of appeals in its *de novo* factual findings has, at the very least, deprived this Court of such a clear record. As petitioner has described

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[7] For example, Section 17 of the New York Public Officers Law obliges the State of New York to indemnify its public employees for actions taken within the scope of their employment but not for intentional wrongdoing. N.Y. Pub. Off. Law § 17(3)(a) (McKinney 1988 & Supp. 1992).

in detail, Pet. at 18-24, the district court did not find that willful misconduct was involved here, no one had argued that petitioner had acted willfully, and the record does not in fact support a conclusion that petitioner acted willfully. Yet the court of appeals – not surprisingly, given the inherent institutional limitations on its ability to find facts accurately – confused the evidence and mistakenly concluded that the conduct at issue was willful. Pet. App. 1a. As a result, even the court of appeals' fairly limited discussion of the separation of powers concerns at stake is premised on the mistaken idea that it was vindicating the courts' "deeply rooted . . . authority to enforce their orders and punish *willful* infractions thereupon. . . . " *Id.* at 1327 n.38 (emphasis added). Summary reversal and a remand to the court of appeals will allow the courts below to address the separation of powers issue squarely and possibly eliminate it. Regardless, a more careful characterization of the facts will build the kind of clear record such a significant matter requires. *See* Pet. at 23 n.14.

3. Although appellate fact finding occurs in other contexts,[8] fact finding concerning attorney misconduct is

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[8] *See, e.g., Murphy v. FDIC*, 12 F.3d 1485, 1498 n.7 (9th Cir. 1993) (Norris, J., dissenting); *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 477-78 (4th Cir. 1992) (Widener, J., dissenting), *cert. denied*, 113 S. Ct. 1625 (1993); *Clarke v. Frank*, 960 F.2d 1146, 1154-56 (2d Cir. 1992) (Meskill, J., dissenting); *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 283 (6th Cir. 1991) (Gary, J., concurring in result), *cert. denied*, 112 S. Ct. 1497 (1992); *St. Paul Fire & Marine Ins. Co. v. Lewis*, 935 F.2d 1428, 1434-39 (3d Cir. 1991) (Garth, J., dissenting); *Brown v. Board of Educ.*, 892 F.2d 851, 890 (10th Cir. 1989) (Baldock, J., dissenting).

especially problematic. As pointed out above, although the issue has grave implications, it is not an issue that will emerge as a conflict in the circuits. It is a problem that lurks below the surface of many opinions, but may not often come to light. Appellate courts rarely admit they are going beyond the record, and often the district court opinion is not published or even available through computer services. In addition, because the attorney who has been maligned is not the actual litigant, there may be no reason to petition for rehearing or appeal further. The actual litigant may be pleased with the outcome despite the fact that the attorney was wrongly castigated. Moreover, an attorney who has already been wrongly cast in a bad light by an appeals court is often hesitant to ask a court to correct the error for fear that the error may be compounded, as it was for Mr. Turow. *Cf. Presumed Guilty, supra,* at 1901 ("Instructed by experience, [Turow] will surely not petition the same court" for further relief in the wake of favorable outcome of the bar disciplinary proceedings.).

Summary reversal is particularly appropriate here, because in this petition this Court has before it a case where the issue is cleanly presented. There is no question but that the court of appeals improperly found facts and misstated the record.[9] If the Court waits for another

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[9] The court of appeals' ruling on petitioner's intent is a factual finding, and the court of appeals did so impermissibly, without even alluding to the clearly erroneous standard of Fed. R. Civ. P. 52(a). *See United States v. Yellow Cab Co.*, 338 U.S. 338 (1949) ("Findings as the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those that see and hear them."); *Rogers v. Lodge*, 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982) (noting that issues of intent are

vehicle to address this issue, the Court may be faced with the additional issue of whether the court of appeals was actually finding facts. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 288-89 (1982) (noting difficulty in distinguishing questions of fact from questions of law).

We understand that summary reversal is not the usual disposition for a petition before this Court. Nonetheless, this Court has done so when it believes a decision below to have been wrong. *See, e.g., Board of Educ. of Rogers v. McCluskey*, 458 U.S. 1132 (1982) (reversing court of appeals for plain error when it replaced school board's construction of its rule with the "court's own notions under the facts of the case"); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (single expletive by petitioner in courtroom during trial did not justify use of contempt power). This case goes beyond the terrible wrong done to Randell Means, a wrong which may be reason enough to reverse summarily, even if it involves only a misapplication of settled law to the facts of this particular case. *See, e.g., Dillingham v. United States*, 423 U.S. 64 (1975) (summarily reversing because of the Fifth Circuit's "incorrect reading" of *United States v. Marion*, 404 U.S. 307 (1971)). Reversing the court of appeals in this case, however, will do more than remedy the injustice to the individual litigant in this case. It will also notify courts of appeal that they may not indulge in this abuse of the judicial process.

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commonly treated as factual matters for purposes of the clearly erroneous standard of Fed. R. Civ. P. 52).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, the National Association of Assistant United States Attorneys and the National District Attorneys Association respectfully submits that the petition should be summarily reversed.

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Dated: May 20, 1994

MOTION FILED
MAY 23 1994

No. 93-1663

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RANDELL P. MEANS,
Assistant United States Attorney,
in his individual capacity,
Petitioner,
v.
BRENDA CHILCUTT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF 403 ATTORNEY-EMPLOYEES OF THE UNITED STATES DEPARTMENT OF JUSTICE, IN THEIR INDIVIDUAL CAPACITIES, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

All of the following join this motion and brief individually and *pro se*. While each may receive mail c/o Department of Justice, Washington, D.C. 20530, the Court need not send orders, etc., to any of the following as arrangements have been made to receive notice of the Court's entries through petitioner's counsel, and service of briefs by other parties is similarly waived. Phone numbers of three contact persons are indicated below and the remaining *amici* are in alphabetical order showing names only.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1663

RANDELL P. MEANS,
Assistant United States Attorney,
in his individual capacity,
Petitioner,

v.

BRENDA CHILCUTT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF 403 ATTORNEY-EMPLOYEES OF THE UNITED STATES DEPARTMENT OF JUSTICE, IN THEIR INDIVIDUAL CAPACITIES, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

The 403 individuals identified on and inside the cover jointly seek leave, pursuant to Rule 37.2 of the Rules of this Court, to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari in this case. We include 263 Assistant United States Attorneys from 46 different United States Attorney's offices around the country and 140 other attorneys employed in various Washington, D.C. offices within various divisions of the United States Department of Justice ("Department"), who

travel to and appear in federal courts throughout the United States. We do not make this submission on behalf of the United States or the Department; rather, we submit this in our individual capacities. The Department has neither encouraged us to file nor discouraged us from filing this motion and brief. We did first ascertain that the Department does not object to Department employees, in their individual capacities, joining in filing an *amicus* brief in this case. The grounds for this motion are as follows:

1. Kelly Robbins Harrington, as counsel for plaintiffs below, Brenda Wortham, f/k/a Brenda Chilcutt, and Home Indemnity Company, has orally refused to give consent to our filing an *amicus* brief (and has failed to respond to several requests for written confirmation). Randell Means (by counsel Carter Phillips) and the United States (by Solicitor General Drew Days) did give consent.

2. The court of appeals, in affirming an injunction prohibiting petitioner from asking the Department, pursuant to 28 C.F.R. § 50.15, to indemnify him for a discovery sanction, made unwarranted and improper findings of fact, not made by the district court below, that petitioner "intentionally withheld documents" and "knowingly engaged in blatant misrepresentations to the district court about the existence of those documents." As government attorneys, we each have a personal individual interest in being protected from the possibility of having our professional reputations destroyed by errant court of appeals fact findings that indicate ethical or even criminal misconduct, which the trial court either did not address or refused to find.

3. Also, each of us is an employee of the Department to whom its reimbursement regulation applies. Each of us therefore has a personal interest in seeing the court of appeals decision reversed and remanded so as to force the court of appeals to face the issue that was originally before it, but which its improper fact findings caused it

to circumvent. That is the issue of whether a court can enjoin our resort to the reimbursement regulation for the reasons stated by the district court—that taxpayers should never bear the cost of our mistakes, regardless of good faith.

4. The attached brief, while exhibiting minor overlap, is not merely duplicative of the petition. We elaborate upon certain points that were only a secondary focus of the petition and make several points not explicit in the petition. For example, we demonstrate precisely what the court of appeals was referring to when it mistakenly stated that the district court found that petitioner exhibited a "flagrant disregard for his discovery obligations." We point out that vacating procedurally defective findings of serious ethical misconduct by attorneys is an imperfect remedy such that this Court should admonish the courts of appeals to cease from making such findings. We demonstrate that the court of appeals' improper findings of egregious willful misconduct blinded it to a number of important legal issues raised by the district court's two injunctions, which issues it all but ignored. In this regard, we add increased focus both (1) on the part of the injunction directed at the costs of plaintiffs' deposing the independent contractor and (2) on the supplemental reimbursement injunction, related to the payment for the attendance of plaintiffs' counsel at a post-trial contempt/disciplinary hearing.

5. We are aware that the National Association of Assistant United States Attorneys ("NAAUSA") will be filing, or at least seeking leave to file, a brief as *amicus curiae* in support of the petition. However, NAAUSA does not include attorneys employed at the Department's headquarters in Washington, D.C. and many of the Assistant United States Attorneys joining this motion and brief in their individual capacities are not members of

NAAUSA. We are attempting not to duplicate what we understand will be the focus of NAAUSA's brief.

Respectfully submitted,

The 403 attorneys listed on and inside the cover, *pro se*

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May 23, 1994

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BRIEF OF 403 ATTORNEY-EMPLOYEES OF THE UNITED STATES DEPARTMENT OF JUSTICE, IN THEIR INDIVIDUAL CAPACITIES, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTION

As indicated in the motion for leave to file this brief, the individuals who have joined this brief as *amici curiae* in support of the petition are 403 attorneys who are employed by the United States Department of Justice ("Department") to represent the United States of America in criminal and civil cases throughout the country, including 263 Assistant United States Attorneys from 46 different districts and 140 trial attorneys employed in various Department offices and divisions located in Washington,

D.C. We submit this in our individual capacities and not on behalf of the United States or the Department of Justice, which has neither encouraged us to file nor discouraged us from filing this brief. We did first ascertain that the Department does not object to Department employees, in their individual capacities, joining in filing an *amicus* brief in this case.

We would add that the communications among us that resulted in this submission were informal, and we expect that the vast majority of Assistant United States Attorneys around the country and attorneys employed at the Department's headquarters were unaware of our endeavor at the time of filing.

INTEREST OF *AMICI CURIAE*

The district court in this case, pursuant to Fed. R. Civ. P. 37(d), ordered the petitioner, an Assistant United States Attorney, to personally compensate plaintiffs for their expenses incurred both in moving to compel discovery responses that were late and in deposing an independent contractor responsible for cleaning the floor of the U.S. Postal facility where the plaintiff slipped and was injured. Further, on its own motion, the court enjoined petitioner from exercising his rights under a Department of Justice regulation to request indemnification of the monetary award.

The court of appeals, in affirming that injunction, ignored the relatively non-accusatory (but legally insufficient) basis upon which the district court entered the injunction—viz, that the cost of petitioner's mistakes in respect to discovery compliance should not be borne by the taxpayers. Instead, the court of appeals made unwarranted and improper findings of fact that petitioner "intentionally withheld documents" and "knowingly engaged in blatant misrepresentations to the district court about the existence of those documents." These improper appellate-level fact findings do grievous harm to petition-

er's professional reputation far exceeding the economic impact of the order from which the appeal was taken.

It appears to us, as government attorneys, that allegations of prosecutorial or professional misconduct by our adversaries in criminal and civil cases, unfortunately, have become increasingly frequent. We each therefore have a personal individual interest in being protected from the possibility of having our professional reputations destroyed by errant court of appeals fact findings that indicate ethical or even criminal misconduct, which the trial court either did not address or refused to find. This interest extends to any case, whether civil or criminal, involving allegations of misconduct at the trial court level that are expressly relied upon on appeal as a ground for affirmance of a judgment against the United States or reversal of a judgment in its favor. This interest also extends to cases, such as petitioner's, in which one of us, personally, may be appealing a sanction, and especially if the sanction was ordered for conduct of a nature far less egregious than that which is then "found" by the court of appeals.

Further, each of us is an employee of the Department to whom its reimbursement regulation applies. That regulation is intended partly for our personal benefit—to protect us against incurring substantial expense in the good faith performance of our duties. The regulation states that any "Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee." 28 C.F.R. § 50.15(c)(4). Each of us therefore has a personal interest in seeing the court of appeals decision reversed and remanded so as to force the court of appeals to face the issue that was originally before it but which its improper fact findings caused it to circumvent. That is the issue of whether a court can enjoin our resort to the reimbursement regulation for the reasons stated by the district court—that taxpayers should never bear the cost of our mistakes, regardless of good faith or how heavy an attorney's case load may be.

STATEMENT

We rely upon the facts set forth in the Statement contained in the petition.[1] Not every one of us has individually familiarized himself or herself with the record below. Those of us who have not are nevertheless sufficiently disturbed by the case as it has been described, both in the petition and by trustworthy colleagues, to express dismay at both the result and the process by which it was reached. Those of us who have reviewed the record find the petition fully accurate.[2]

REASONS FOR GRANTING THE PETITION

We also adopt the petition's statement of "Reasons for Granting the Petition" and would add or stress the following points. The law is well established that courts of appeals may not find facts. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). There may arguably be an exception where the evidence points only one way such that facts are established "as a matter of law," but that is not the case here (at least not in the direction of supporting the Fifth Circuit's findings). The law is equally well established that, although appellees may defend a judgment based upon contentions reserved in the trial court, courts of appeals generally do "not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 119-20 (1976). Exceptions may be made in extraordinary cases, such as where injustice might otherwise result, *id.* at 121, but this is not such a case. *See also Hormel* v. *Helvering*, 312 U.S. 552, 556-57 (1941). Where an issue has not even been raised

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[1] The remainder of this brief presumes a prior reading of the petition and thus refers to certain persons, things, and events in a short-hand fashion similar to the petition. "Pet." citations refer to the pages of the petition. "Pet. App." citations refer to the pages of the appendix bound with the petition.

[2] We are aware that one of the two pages comprising the "Svede log" referred to in the petition was inadvertently left out of the appendix to the petition. The omitted page makes no reference to plaintiff's accident or any other accident at the River Bend facility.

before the trial court, it is particularly improper for a court of appeals to resolve it.

Here, plaintiffs did not request the injunction and they sought to defend it on appeal only on the basis upon which the district court had entered it. There was no finding that petitioner lied or was contumacious, and there could not have been any such finding at the time of the injunction, as the district court was then completely unaware of the existence of the Svede log. Neither was there any district court finding of "flagrant disregard" for discovery obligations as suggested by the court of appeals. 4 F.3d at 1326 n.35 (Pet. App. at 27a n.35).[3] To the contrary, when the injunction was entered, the district court knew only that petitioner Means was late serving his discovery responses, that the Postal Service had not timely provided all information and documents,[4] and that petitioner had not interviewed an independent contractor before serving his responses to plaintiffs' interrogatories (which the district court appeared to view most seriously).

Nor did the appeal from the judgment against the government warrant the errant appellate fact findings.

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[3] The fact portion of the Fifth Circuit opinion quotes the trial judge as expressing concern over what appeared to be "a rather flagrant violation of the discovery obligations" by Mr. Means. 4 F.3d at 1319 (Pet. App. at 10a). However, this quote is from the trial judge's explanation of why he determined to hold the July 28 contempt hearing, and is expressly a reference to the "subject of the accident log, which appeared to be . . . a rather flagrant violation of the discovery obligations." July 28 Tr. at 4 (Pet. App. 58a). At the time the injunction was issued, the district court had no knowledge of the existence of the Svede log. And, at the time it made this comment on how things "appeared," the district court had not yet heard the explanation that there were two logs.

[4] We recognize that petitioner has "admit[ted] he made mistakes and he regrets them." (Pet. at 27.) Indeed, he could have formally moved for an enlargement of time or responded timely with such information as he had received from the Postal Service.

Plaintiffs never accused petitioner personally of lying or deliberately concealing evidence, either in seeking sanctions against the government or in defending the judgment on appeal. To the contrary, in attempting to defend the judgment against the government, plaintiffs' brief expressly attacked the credibility only of the postal employees and accused only the postal employees of deliberately withholding documents—implicitly from petitioner as well as from plaintiffs.[5]

Because the law precluding appellate fact findings is so well established, we agree with petitioner that this Court need not entertain briefing and argument in this case, but rather should summarily reverse and remand the case to the court of appeals to reconsider its ruling without resorting to fact finding. We submit that the court of appeals should also be directed to focus on the basis upon which the district court entered the injunction; it should not entertain hypothetical legal premises upon which the district court might otherwise have entered an injunction against reimbursement that were not passed upon by the district court. If the Fifth Circuit determines on remand that supplemental fact findings are necessary (which is not to say that they are), it may remand the case to the district court for that purpose, but it should not substitute its own fact findings for those made, or omitted, by the district court.

Summary reversal would go a long way toward eliminating the harm to petitioner's reputation flowing from

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[5] Brief for the Appellees at 7, 10 (5th Cir., filed Jan. 25, 1993). We express no opinion on whether postal employee Al Svede concealed the Svede log or, as he testified, forgot about its existence until the afternoon it was disclosed and produced. That Svede had not theretofore disclosed it to petitioner is corroborated and unrebutted, and was not contested by plaintiff. At the same time, we would add that the court of appeals should not have cast aspersion on Svede's credibility when the district court found him honest. July 28, 1992 Tr. at 84 (Pet. App. at 114a.)

the court of appeals' errant fact findings. At the same time, petitioner's reputation probably can never be fully restored. Apart from the publicity the Fifth Circuit decision generated,[6] its opinion will forever be available in West's Federal Reporter and through on-line legal research services (via a search for petitioner's name). Even if this Court vacates the improper fact findings, those who come across the Fifth Circuit opinion may continue to wonder whether those findings were or were not correct. In fact, as the petition implicitly demonstrates (assuming its depiction of the record is accurate), the court of appeals' findings, if made by a trial court, could not survive ordinary appellate review under a "clearly erroneous" standard.[7]

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[6] *E.g.*, *The Texas Lawyer*, Nov. 1, 1993 ed. (vol. 9, no. 33), at 8; ABA, *Pass it On: The Newsletter of Government and Public Sector Lawyers Division*, Feb./Apr. 1994 ed. (vol. 3, no. 3), at 7. The latter article characterized the case as one "with wide-ranging implications for government lawyers."

[7] The court of appeals' most critical findings of fact inhere in the opinion's statement that petitioner "had previously referred to the [Svede] accident log several times, both in his [June 3, 1992] response to [plaintiffs'] supplemental motion for sanctions and in a [June 4, 1992] hearing before the court in which he had affirmed as an officer of the court, that he had reviewed that particular log." 4 F.3d at 1319 (Pet. App. at 10a) (footnotes omitted). The opinion purports to support these findings with cross-references to footnotes 11 and 12 of the opinion, which quote petitioner's representations. *Id.*, nn. 15 & 16. *See also id.* at 1318, 1323 (Pet. App. at 7a, 19a). As the petition demonstrates, the excerpt of petitioner's statements to the district court on the morning of June 4, quoted in footnote 12 of the opinion, which the court of appeals found to reveal his prior personal examination of the Svede log, includes, in the very same sentence, a description of "the time periods in that log" as covering accidents during the period "1987 through the present." *Id.* at 1318 n.12 (Pet. App. at 8a n.12). This was the period covered by the Kunkle safety office logs. (R. 436.) The Svede log, however, covers accidents occurring only in 1988 and 1989. Petitioner, therefore, clearly was referring not to the Svede log, as the court of appeals found, but rather to the Kunkle logs—the only logs of which he was then aware, as later

Because there is no ordinary appellate review of appellate-level fact findings, this Court is the only forum for relief in such cases. Moreover, because the harm to an attorney's reputation from procedurally-defective fact findings generally cannot be entirely eliminated by a higher court's reversal, it is important for this Court not only to grant the relief sought by the petition but also to admonish the courts of appeals not to make findings of fact regarding alleged ethical misconduct at the trial level. Summary reversal would convey that message forcefully here.

This problem is not an isolated one. We understand that the *amicus* brief of National Association of Assistant United States Attorneys will cite other instances where the courts of appeals have reached out to condemn government attorneys for perceived misconduct not found by the trial court. The courts of appeals rightfully expect government attorneys to adhere to the highest standards of professional ethics. However, no matter how much it may seem that willful misconduct may have occurred, the courts of appeals must resist the temptation to assume facts not adjudicated below or render legal judgments on issues not presented on appeal.

Summary reversal will help assure government attorneys (and attorneys generally) that when courts of appeals do deviate from accepted procedure and make fact findings respecting ethical misconduct, they will be corrected.

Summary reversal will also assure that the court of appeals must face the important issue originally presented

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revealed by the July 28 testimony of both petitioner and Al Svede. To the extent the court of appeals also was disturbed by that part of petitioner's June 3 response to plaintiffs' supplemental sanctions motion which responds expressly to plaintiffs' contention that Al Svede had a responsive log, that part of petitioner's June 3 response expressly states that it is "based upon the answer provided by Al Svede" and not on petitioner's personal examination of, or knowledge of the existence of, the Svede log. 4 F.3d 1318 n.11 (Pet. App. at 7a n.11).

to it on appeal—whether petitioner was properly enjoined from requesting indemnification under the Department's regulation in the absence of willful misconduct and on the basis articulated by the district court. The regulation states that any "Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee." 28 C.F.R. § 50.15 (c)(4). The explanation for the promulgation of the regulation indicates that "[a] change in Department policy to permit the indemnification of Department employees . . . would accord Department employees the same protection now enjoyed by most state and local government employees as well as employees of most corporate employers." *Statement of Policy Concerning Indemnification of Department of Justice Employees*, 51 Fed. Reg. 27021 (1986). Thus, the regulation operates as a form of malpractice insurance. *Cf. Derechin* v. *State University of New York*, 963 F.2d 513, 518 (2d Cir. 1992). The language of the regulation also makes it clear that what is contemplated is the reimbursement of an "employee" by its employer. Thus, the injunction in the case at bar is not one that serves to protect a client from an improper demand by its counsel to cover the costs of an order that counsel satisfy a Fed. R. Civ. P. 37(d) award. Rather it is more analogous to an injunction that an attorney not seek or accept reimbursement from the law firm that employs the attorney or a malpractice insurance carrier. *Cf. Derechin, supra.*

We recognize that the party awarded fees against an attorney under Fed. R. Civ. P. 37(d) is not able to seek recourse against that attorney's law firm, but that is a far cry from holding that *voluntary* reimbursement by a law firm or other employer should generally be enjoined. As indicated in *Derechin*, public policy against allowing insurance to cover willful misconduct may favor a prohibition on reimbursement from any source in such cases. Absent willful misconduct, however, there appears to be

no rational basis for such an injunction. Nor is the analysis under Rule 37(d) necessarily identical to that under Rule 11, as the Fifth Circuit appears to have assumed (4 F.3d at 1326, Pet. App. at 25a-26a), given its heavy reliance upon *Derechin* and on *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120 (1989), in which this Court held that only the individual attorney who signs a pleading in violation of Rule 11, and not his law firm, could be made to pay the sanction. The two rules embody different purposes and are worded differently. Rule 11 imposes a sanction on the "signer" and is directed primarily at punishment and deterrence, *see id.*; Rule 37(d) is directed primarily at compensating one who is required to move to compel discovery in order to obtain compliance and allows an award of expenses against the party "or attorney advising that party" not to comply.

Moreover, we question the source of the court's authority to enter the supplemental injunction which, in ordering petitioner to pay plaintiffs' counsel for the expense of attending the July 28 hearing, expressly enjoined him from seeking or accepting reimbursement "from any person or entity" (Pet. App. 53a-54a). The final judgment in plaintiffs' case had been entered and discovery was no longer sought (and Rule 37 was not implicated). Both the award and the accompanying injunction therefore had to be premised upon the district court's "inherent power." However, the Fifth Circuit has held that a sanction premised upon the court's inherent power must be supported by a finding of bad faith, and no such finding was made by the district court in this case. *Resolution Trust Corp.* v. *Bright*, 6 F.3d 336, 340 (5th Cir. 1993). Nor did the district court make any specific fact findings from which the court of appeals could conclude that bad faith existed as a matter of law. Thus, the court of appeals' own fact findings appear to have blinded it to these serious legal issues.

The *amici* filing this brief are also particularly disturbed by the fact that the injunction appealed from extended to that part of the monetary award which covered plaintiffs' expense of deposing the independent contractor. (Pet. App. at 33a.) As government attorneys, we do not believe it is our responsibility to interview every independent contractor with knowledge potentially material to a lawsuit against the government before responding to discovery. Independent contractors are just that—"independent." They are equally subject to being interviewed by counsel representing any party. Moreover, in a tort case regarding the maintenance of government premises, the negligence of an independent contractor may not be attributed to the government, *Logue* v. *United States*, 412 U.S. 521 (1973), and an independent contractor may conceivably be liable to the government on an indemnity or contribution claim and thus be potentially adverse. Moreover, government attorneys certainly cannot be placed in a position of converting the statements of an independent contractor into answers to interrogatories that would then constitute admissions of the government under Rule 801 of the Federal Rules of Evidence or subject the federal official signing the answers to sanctions if the information provided proves false. In any event, a government attorney who fails to find the time to interview third parties before responding to interrogatories should not be ordered to pay for an adverse party's deposition of an independent contractor.[8] The additional sanction of enjoining a Department attorney from applying for reimbursement under the Department's indemnity regulation is a thoroughly offensive abuse of judicial power. The court of appeals'

[8] *Cf. In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993): "the court should recognize that parties have a host of problems beyond the immediate case . . . [and] [t]his is particularly true of the government." (*Stone* involved a petition for a writ of mandamus to stop the Hon. John McBryde—the district judge in the instant case—from continuing a standing order that high government officials attend every settlement conference.)

treatment of this aspect of the June 2 order was woefully inadequate.

Finally, we note that the conflict between the Department's regulation and the district court's reasons for the reimbursement injunction could not be more stark. The regulation contemplates precisely that the taxpayers may bear the costs of good-faith mistakes made by government attorneys. The court of appeals must face the issue put before it on appeal and address the conflict between the district court's holding and the contrary intent of the Department's regulation.

This case reflects more than just interference with the Department's indemnity regulation in that it actually turns the regulation upside down, converting the government's trial attorney into the insurer for agency compliance with discovery. Given the Postal Service's contribution to the lack of timely compliance, and the unrebutted admission of Al Svede that the failure to produce the log was entirely his fault, the district court's failure to address the allocation of relative fault while imposing the entire cost on Mr. Means, compounded by the court of appeals' impermissible fact findings fixing the blame entirely on Mr. Means, is especially problematic.

Many of those joining this brief have faced a situation where a represented government agency has failed to produce information and documents timely. Many of us have also been involved in cases where, after repeated representations that all responsive records have been turned over, an agency suddenly found a new document responsive to an adversary's request for production.[9]

[9] This is not to suggest that the agencies we represent are irresponsible. The fact is that government agencies must keep track of large volumes of records, and something is also occasionally lost in communicating the meaning of production request specifications to agency personnel. For example, paragraph 28 of plaintiffs' production request in the instant case, the paragraph which plaintiffs' counsel insisted covered the Svede log, calls only

The prospect of having to pay, out of our own pockets, substantial monetary awards to our adversaries for such agency omissions is chilling. The prospect of then only being able to appeal such a sanction at the risk that the appellate court will make new findings that irreparably damage our reputations is grossly unfair. Faced with that choice, we may of course decide not to appeal such a sanction. But that is not justice.[10]

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for documents "in regard to the condition of the premises as a cause or possible cause of any accidents" thereat. (R. 111.) The only accident at the River Bend facility that is referenced in the Svede log is the Chilcutt accident, and the descriptive information (other than name, address, date, etc.) consists of "Injured back" and "Patron fell in lobby of Riverbend P.O." (Pet. App. at 120a.) Apart from Al Svede's July 28 testimony that he simply forgot about the log (Pet. App. 72a), which was "rolled up in a file cabinet" (Pet. App. 64a), it would not necessarily have been immediately called to mind by his review of the production request, even with the assistance of counsel. Nonetheless, Mr. Means was compelled to pay as a result of the failure of Mr. Svede to produce this innocuous document.

[10] The court of appeals' decision may surely erode confidence in the judicial system. Summary reversal would thus serve the well-recognized interest of the judiciary in maintaining the public reputation of judicial proceedings for fairness. *E.g., New York Cent. R.R.* v. *Johnson*, 279 U.S. 310, 318 (1929); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993).

CONCLUSION

The petition should be granted and the decision of the court of appeals should be summarily reversed with a direction to decide only the issues that were presented to it on appeal and with a further admonition to avoid making findings of fact not made by the district courts, particularly where such findings may implicate counsel in unethical conduct or otherwise tarnish an attorney's reputation.

Respectfully submitted,

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May 23, 1994

Supreme Court, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 93-1663

In the Supreme Court of the United States

OCTOBER TERM, 1994

RANDELL P. MEANS, PETITIONER

v.

BRENDA CHILCUTT WORTHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' affirmance of the district court's order that the discovery sanctions imposed on petitioner be non-reimbursable should be summarily reversed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 4 F.3d 1313. The orders of the district court (Pet. App. 31a-34a, 35a-36a, 37a-38a, 39a-43a, 44a-52a, 53a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1993. A petition for rehearing was denied on December 22, 1993. Pet. App. 55a. On March 16, 1994, Justice Scalia extended the time for the filing of a petition for a writ of certiorari to and including April 21, 1994. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The primary claim advanced by petitioner is that the court of appeals improperly made findings of fact about petitioner's withholding of documents and information during the discovery stage of this case that were not made by the district court and that harmed petitioner's reputation. Pet. App. 16a. In light of that very fact-specific claim, a full statement of the facts and proceedings in this case is appropriate.

1. On October 4, 1988, respondent Chilcutt [1] slipped and fell on the floor of the River Bend Post Office in Fort Worth, Texas. In April, 1991, Chilcutt and Home Indemnity Company, the insurance carrier that had provided her with workers' compensation benefits, brought suit under the Federal Tort Claims Act against the United States, alleging that Chilcutt's fall resulted from the negligence of the United States in failing to maintain the floor in a safe condition.

2. After one extension of time, the district court set a discovery cut-off date of May 8, 1992, and scheduled trial for the week of June 8, 1992. In doing so, the court admonished the parties and counsel to cooperate in the discovery process and warned that violations would be subject to sanctions. On March 24, 1992, plaintiffs served a set of interrogatories and requests for production of documents on the government. The government's responses were due by April 23, 1992. Petitioner was the government's trial counsel. Although plaintiffs' counsel

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[1] After the beginning of this litigation, Brenda Chilcutt married and took the name Brenda Wortham. In order to conform to the petition and the references in the district court record, we refer to her as Brenda Chilcutt.

spoke to petitioner several times about these requests, both before and after the answers were due, and was assured that responses were forthcoming, no responses were filed by either the due date or the May 8 discovery cut-off date. On May 19, 1992, plaintiffs filed motions to compel discovery and for sanctions. Pet. App. 3a-4a & nn.2-3.

3. The district court scheduled a hearing on plaintiffs' motions to compel and for sanctions for May 22, 1992. On that date, petitioner served answers to plaintiffs' interrogatories and also produced some documents. Plaintiffs objected to the incompleteness of the government's interrogatory answers and the document production, as well as to the lateness of petitioner's responses. In response, the court ordered a deposition to be taken, at no expense to plaintiffs, of the independent janitorial contractor responsible for maintenance of the floor at the River Bend post office, the site of the accident. In addition, the court ordered that all remaining documents should be produced by May 27, 1992. Pet. App. 4a-5a.

The court deferred ruling on plaintiffs' requests for more serious sanctions at the May 22 hearing. The court did rule that it would award plaintiffs all of their expenses on the motion to compel—as well as their expenses to depose the independent contractor—to be paid personally by petitioner. The court observed that "I don't think that this sort of thing should be borne by the taxpayers." C.A. R.E. 38; see also Pet. App. 40a (repeating that justification in written order). The court also ordered petitioner to attach his own affidavit to the responses to the discovery requests stating that the documents he had produced constituted all the responsive documents within the government's possession and control. See Pet. App. 31a-33a.

Plaintiffs filed a statement of fees and expenses in litigating the motion to compel, amounting to more than $7,000. After a hearing on June 1, 1992, the court awarded fees and costs in the amount of $2,500, to be paid by petitioner by June 8, 1992. Pet. App. 35a-36a. The court ordered petitioner to file an affidavit stating that he paid the sanction "with his own personal funds and that he has not sought or received and will not seek or receive, reimbursement from the government for all or any part of such sum." Pet. App. 36a.

4. On June 1, 1992, plaintiffs filed a supplemental motion for sanctions, alleging that the government's production of documents was still inadequate. Among the subjects at issue in that motion, and at the hearing on the motion held on June 4, 1992, was an accident log maintained by postal employee Al Svede. In his original responses to plaintiffs' discovery requests, as well as at the May 22 hearing, petitioner had stated that such a log did not exist. However, when Svede had earlier been deposed, his testimony had indicated that such a log had been maintained. Thus, after testifying that postal employee Robert Kunkel maintained a log of accidents, C.A. R.E. 67, Svede added:

> Basically, all [Kunkel] does is he has a log that keeps all accidents, vehicular and non-vehicular. As far as being in litigation, that would be in my office * * *.

Id. at 67. Later in the deposition, Svede was asked whether he had any information about claims against the post office that had been denied after he had investigated them. He replied that:

> It's in the reports—I mean in my log. If there are claims filed, I have records. I believe our retention time is three years on those.

C.A. R.E. 74.

As a result of Svede's deposition testimony, plaintiffs expected to obtain Svede's log in response to their original document requests. When petitioner stated that the log did not exist, plaintiffs included the government's failure to produce the Svede log in their June 1 supplemental motion to compel production and for sanctions. On June 3, the government filed a response that referred to plaintiffs' "complain[t] that Al Svede has not produced his own log," and stated that:

> [The government] has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's [document] request.

Pet. App. 7a n.11 (emphasis omitted).

5. During the morning session of the June 4 hearing, plaintiffs again asked for "[t]he accident log maintained by Mr. Svede." June 4 Tr. 46. The court then inquired why "those accident logs" had not been produced. June 4 Tr. 48; see Pet. App. 7a n.12. Petitioner responded that Chilcutt's accident was not recorded in "those logs." June 4 Tr. 48-49; see Pet. App. 7a n.12. After further inquiry by the court, petitioner stated:

> As our response to this supplemental motion states, I am stating under oath before the court as an officer of the court that my representations in that motion are correct, that a search of that log has been conducted, and no accident has been identified to the time periods in that

> log—and I believe it's 1987 through the present —for the premises, River Bend Finance Unit, for both employee accidents or complaints or customer accidents.

June 4 Tr. 50; see Pet. App. 8a n.12.

Plaintiffs had also sought production of "an additional document, a Form 1769," which they explained was "a standard accident report form that the post office uses" and which they claimed Chilcutt had filled out on the date of the accident and given to Iona Smith, a post office window clerk. June 4 Tr. 56, 57. Petitioner had initially justified the government's failure to produce this form on the ground that it did not exist. At the June 4 hearing, petitioner told the court that the government's position was that no such form had been filled out, and that Smith and others would corroborate that fact. June 4 Tr. 57. The court ordered that Svede and Smith should appear in court after the lunch break, together with "any document pertaining to this accident" that had not previously been produced, and the court stated that it "want[ed] to see each of the accident logs that we have been talking about." June 4 Tr. 59, 60.

Svede and Smith were contacted and told to appear in court that afternoon, and to bring with them any documents that had not yet been produced. Pet. App. 80a. When Svede met petitioner at the lunch break, he brought with him a log of post office accidents that had been on top of a filing cabinet in his office. The log contained a report of Chilcutt's accident. Pet. App. 63a-64a. Svede showed the log to petitioner before the court began the afternoon session of the hearing. Pet. App. 63a.

When the court reconvened at 2:00 that afternoon, plaintiffs stated that they wanted to examine Iona

Smith. The court itself conducted the primary questioning of Smith. June 4 Tr. 78-83. She testified that the only form she ever filled out concerning Chilcutt's accident was a "Form 13." June 4 Tr. 82-83. In response to plaintiffs' counsel's questions, she specifically denied that Chilcutt had given her a Form 1769 on the day of the accident. June 4 Tr. 86.

Al Svede was then called to the stand. The court conducted the initial questioning of Svede. June 4 Tr. 89-94. Svede stated that a Form 1769 had been filled out for Chilcutt's accident, and that he had a copy of it. June 4 Tr. 93. Then, in response to plaintiffs' counsel's questions, Svede stated that the Form 1769 "is not a form I produce" and that he "can't recall" where he saw the Form 1769. June 4 Tr. 95. Petitioner briefly questioned Svede about another matter. June 4 Tr. 97-98.

The court then asked for copies of the Form 1769, the "listing in the accident log that the witness said he prepared," and other items. June 4 Tr. 100. Petitioner stated that he had the accident log, but that he did not have the Form 1769. *Ibid.* The court then asked Svede where he saw the Form 1769, and Svede replied:

> That's just—I don't know where. It is just that I think that I have seen one. But, like I said, I have seen—I am not sure—

Ibid. He also stated that he did not know when he had seen the Form 1769. *Ibid.*

Petitioner asked Svede to produce the accident log and some other documents, and they were provided to the court. June 4 Tr. 100. After the court examined Svede's accident log and found the reference in it to Chilcutt's accident, the court asked petitioner why Svede's log had not previously been produced to

plaintiffs. Petitioner stated that the log "is not covered by any document production request or subpoena duces tecum." June 4 Tr. 105. However, the court ruled that the log was in fact called for by the plaintiffs' document requests. June 4 Tr. 109. The court also noted that the log contains entries for various falls in lobbies of other post offices, which could have led to further lines of investigation by plaintiffs. June 4 Tr. 107-108.

Chilcutt herself then took the stand. She testified that she filled out a Form 1769 on the afternoon of the accident and returned it to Iona Smith at the post office that day. June 4 Tr. 112. Then, a friend of Chilcutt's testified that she had gone with Chilcutt to the post office on the day of the accident, that Chilcutt had picked up a "report," and that Chilcutt's supervisor at work told her to leave work early that day to "go by the post office to turn it in." June 4 Tr. 130. The friend did not testify concerning the contents of the "report," nor did she claim to have seen Chilcutt give it to Smith or anyone else at the post office.

In closing argument, petitioner continued to disagree with the court concerning whether the Svede accident log was responsive to plaintiffs' discovery requests. June 4 Tr. 143. He also stated that he "would submit that accident log page was not withheld as a result of any trickery or improper motive on the part of the defendant United States." June 4 Tr. 144. He went on to say that "personally and professionally as counsel, it was, as discussed in the—." *Ibid.* At that point, the court informed him that he was out of time. *Ibid.*

The court then stated that severe sanctions against the government would be warranted because of the government's delay in filing timely responses to plain-

tiffs' discovery requests, which in the court's view had delayed plaintiffs' preparation for trial. June 4 Tr. 145-147. The court further found that the government had failed to provide all responsive documents in response to the court's May 22 order. In particular, the court stated that it "can't imagine why that accident log was withheld because there is no question but what it was called for by the requests for production and was obviously known to people that were working on the case on behalf of [the government]." June 4 Tr. 148. As a sanction, the court ruled that the elements of plaintiffs' prima facie case would be taken as proven, although the government would be allowed to prove any affirmative defenses it might have. June 4 Tr. 151-152. Ultimately, after a trial that centered on the damages issue, the court entered judgment for plaintiffs in the amount of $892,567.

6. On July 1, 1992, the district court entered a sealed order expressing concern "with certain representations concerning discovery matters" by petitioner. Pet. App. 44a. The court stated that those representations "were factors the court considered in deciding on the severity of the sanctions" in this case. *Ibid.* The court said that its review of the transcripts "heightened" its concern. *Ibid.* The court stated that "[t]he area of greatest concern has to do with apparent misrepresentations by [petitioner] to the court about the accident log" prepared by Svede. Pet. App. 45a. The court proceeded to recount some of the events of the June 4 hearing. Pet. App. 46a-51a. The court concluded that it "might well" be the case that petitioner was guilty of contempt of court, incompetence, or signing certifications in violation of Fed. R. Civ. P. 11, or that petitioner had "subjected himself to disciplinary action under the inherent

powers of the court." Pet. App. 51a-52a. In view of the seriousness of the charges, however, the court stated that it "intends to proceed with special caution." Pet. App. 52a. The court ordered that a hearing be held, at petitioner's option, to "giv[e] [petitioner] opportunity to explain his conduct," prior to any show-cause contempt hearing that might ultimately be held. *Ibid.*

A hearing for this purpose was held on July 28, 1994. At the hearing, petitioner and Svede testified that there had been two different sets of logs on which accidents were recorded, one maintained by Svede and another maintained by postal safety officer Kunkel. Pet. App. 63a-67a, 77a, 93a. Petitioner testified that, before the afternoon of June 4, he had known only of the Kunkel log, which he had reviewed and which contained no entry for Chilcutt's accident. Pet. App. 83a, 88a, 95a. Although Svede's reference to the existence of his own log at his deposition had triggered plaintiffs' repeated efforts to obtain it, petitioner testified that each time plaintiffs asked for the log, he had understood them to be asking for Kunkel's log, which was not responsive to plaintiffs' document requests because it contained no reference to any accident at the River Bend Post Office. Pet. App. 95a-98a, 99a-110a. Petitioner testified that he first found out about the Svede log when Svede showed it to him during the lunch break of the June 4 hearing. Pet. App. 93a, 102a. Petitioner did not explain why he did not immediately bring the Svede log to the attention of the court when it reconvened after lunch on June 4, in view of the erroneous answer petitioner had given about the existence of the log at the morning hearing. Nor did petitioner explain why he had continued to argue, on the afternoon of June 4, that the Svede log was not responsive to plaintiffs' dis-

covery requests when the log was in fact responsive to those requests. Petitioner's counsel explained that petitioner had "panicked" and made a "shoot-from-the-hip" argument. Pet. App. 105a; see also Pet. App. 60a.

At the conclusion of the July 28 hearing, the court "state[d] some initial reactions." Pet. App. 106a. The court said at the outset that "[o]ne of two conclusions has to be reached: [petitioner] either is totally incompetent as an attorney, or he made blatant misrepresentations to the court." *Ibid.* The court stated that it "[thought] Mr. Svede is basically being honest," but that it was "taking his testimony with a little bit of a grain of salt because of the unlikelihood that he would remember the details of the things that were said between him and [petitioner] back at that time." Pet. App. 114a. The court stated that it thought

> it more likely that [petitioner] was telling it the way it was when he referred in the documents that we have talked about to Mr. Svede's own log, and that [petitioner] knew Mr. Svede had a log.
>
> And I think it likely, almost a certainty, that [petitioner] was representing to the court intentionally that Mr. Svede's own log didn't report the accident in question.
>
> And, of course, that raises the possibility or the prospect that the reason Mr. Svede's log was concealed is that it disclosed other accidents that occurred in a close proximity from a time standpoint.

Ibid.

The court then concluded:

> I have decided I'm not going to pursue the matter of criminal contempt further. I think that

> this is a case where a court could find beyond a reasonable doubt the elements of criminal contempt, but I guess, in a sense, I am giving [petitioner] the benefit of the doubt and simply am not going to pursue that.

Pet. App. 116a.

Later in the day on July 28, the court issued a written order. The court stated: "Having heard the evidence and arguments presented, the court determined that, whether the conduct was intentional or grossly negligent, entry of the following order would be appropriate." Pet. App. 53a. The order entered unsealed all orders that had been issued in this case, included a transcript of the July 28 hearing in the record on appeal in the event of an appeal, required petitioner to attend 15 hours of courses on ethics or professional responsibility, and required petitioner individually and without reimbursement to pay plaintiffs' counsel an additional $625, which represented plaintiffs' counsel's fee for attending the July 28 hearing. Pet. App. 53a-54a.

7. On appeal, the United States, on behalf of itself and petitioner, argued for reversal of both the sanctions against the United States and the non-reimbursement order imposed upon petitioner. The court of appeals affirmed both sanctions.

a. Reviewing the facts of the case, the court of appeals stated that petitioner had, prior to June 4, denied the existence of "an accident log which the plaintiffs claimed Mr. Svede * * * maintained." Pet. App. 4a. The court described the log, which was in the Record Excerpts before the court, see C.A. R.E. 63-66, as "apparently contain[ing] information about remedial actions taken by the USPS in response to Ms. Chilcutt's accident, as well as information on

other accidents which occurred at the River Bend location." Pet. App. 5a n.6. The court also stated that the information "was quite beneficial to" plaintiffs "[b]ecause the same contractor cleaned all of the post offices in the Fort Worth area." Pet. App. 4a n.5. Referring to the July 28 hearing, the court stated that petitioner "claimed at [the July 28] hearing that he had never *seen* the log and had not known that it existed prior to the June 4 hearing." Pet. App. 10a (emphasis in original). The court added:

> The district court thought otherwise, concluding that he could find that the elements of criminal contempt were proved beyond a reasonable doubt. The court determined that [petitioner] had intentionally misrepresented to the court that Mr. Svede's log did not report Ms. [Chilcutt]'s accident. However, giving [petitioner] the "benefit of the doubt," the court chose not to disbar him or hold him in criminal contempt.

Pet. App. 10a-11a. See also Pet. App. 9a (stating that the district court "further found that although the Government and the people working on the case knew that the log existed and that it was called for by the requests for production, the Government chose to withhold the documents in derogation of the discovery rules and the court's order compelling discovery").

The court also stated that petitioner had denied the existence of "a standard accident report ('Form 1769')." Pet. App. 4a-5a. The court said that, at the June 4 hearing, Svede "testified under oath that not only did the Form 1769 exist, *but that he possessed a copy of that form.*" Pet. App. 9a (emphasis in original). The court went on to state that, at the June 4 hearing, petitioner "presented *no* explanation

for his misrepresentation regarding Form 1769," and that:

> In fact, even though Mr. Svede, *the Government's representative*, testified under oath that such a form existed and that he possessed a copy thereof, [petitioner] and the Government—similar to the argument that windmills are dragons—persist in their quixotic claim that the form does not exist.

Pet. App. 9a n.13 (emphasis in original).

b. Citing this Court's decision in *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982), the court ruled that the sanction imposed on the government was appropriate in this case. Pet. App. 13a. The court noted that the district court had provided fair warning to the government of the serious possible consequences of discovery violations. The court stated that "based upon the Government's flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court, the Government should have been relieved that the court did not order a much stiffer penalty." Pet. App. 15a. The court also found that the sanction was warranted because the government had repeatedly promised plaintiffs that it would comply with the discovery requests, thus stringing plaintiffs' counsel along. The court stated that "the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office." Pet. App. 16a. See also Pet. App. 21a ("The district court determined that the only reason the Government withheld the accident log was to prevent the plaintiffs from learning that a number of other customers had also fallen in the River Bend Post Office.").

The government had argued that the sanction of taking the elements of plaintiffs' case as having been proven was tantamount to a default judgment, which could only be entered based on intentional misconduct. The court of appeals responded that, "[r]egardless of the proper *mens rea* standard" required for a sanction of the type imposed on the government, "the credible evidence in the record of this case reveals quite readily that the Government not only intentionally withheld documents that it knew existed, but it also knowingly made blatant misrepresentations to the district court about the existence of those documents." Pet. App. 17a-18a. The court added that "[t]here is ample evidence in the record to support" what it regarded as "the district court's conclusion that Mr. Svede also engaged in misconduct" by not producing the accident log. Pet. App. 19a. The court regarded Svede's testimony that he had "forgotten the log" as "incredible" if "considered alone," and "contrary to" what it regarded as "[petitioner]'s earlier testimony" at the June 4 hearing "that he had reviewed Mr. Svede's log and had determined that it was not responsive to the plaintiffs' requests for production." *Ibid.* The court characterized the government's defense of Svede's claim of forgetfulness as "ludicrous." Pet. App. 20a. Finally, the court noted that the harsh sanction against the government was appropriate because it followed a previous, less harsh sanction, Pet. App. 20a-21a, because it was related to the claim plaintiffs sought to prove through the withheld document, Pet. App. 21a-22a, and because it was necessary to achieve appropriate punishment and deterrence, Pet. App. 22a-23a.

c. In a separate portion of its opinion, the court of appeals also affirmed the nonreimbursement orders imposed on petitioner. The court held that it was

appropriate under the Federal Rules of Civil Procedure to impose discovery sanctions of that kind on government attorneys in the same circumstances in which such sanctions would be imposed on private attorneys, and that such sanctions imposed on government attorneys do not violate separation of powers principles. Pet. App. 24a-29a. The court distinguished a case from another circuit reversing a nonreimbursement order on the ground, *inter alia*, that "the record in this case shows all too clearly that * * * th[e] district court's primary reason in precluding [petitioner] * * * from seeking reimbursement was to punish [petitioner] for his flagrant disregard of his discovery obligations." Pet. App. 27a n.35.

d. Judge Jones concurred in the opinion, except insofar as it suggested that restricting a district court's powers to sanction a government attorney would violate separation of powers principles. Pet. App. 29a-30a. In her view, the government had failed to show that petitioner would have qualified for reimbursement but for the district court order. Pet. App. 30a. She stated that the separation of powers concerns that the government had advanced were accordingly "too speculative." *Ibid.*

8. The United States filed a petition for rehearing. The petition argued that the court had made a number of factual errors in its opinion: (1) Although the court stated that the Svede logs contained information about other accidents at the postal facility where Chilcutt's fall took place and that they contained information about remedial actions taken by USPS, the logs in fact contained no record of any other accident at that facility (although they contained records of accidents at other facilities), nor did the logs contain any reference to remedial actions

taken by USPS. Pet. App. 122a, 125a. (2) Although the court stated that the log could have been useful to plaintiffs because the same contractor cleaned all of the post offices in the Fort Worth area, in fact none of the other accidents entered in the log occurred at post offices cleaned by the contractor who cleaned the River Bend post office. See Pet. App. 125a-126a. (3) Although the court stated that petitioner intentionally misrepresented the contents of the logs, the district court had made no such finding. See Pet. App. 123a. (4) Although the court took as proven the fact that a Form 1769 relating to Chilcutt's accident existed, the testimony of those involved was in conflict on that point and the district court had made no finding to resolve the conflict. See Pet. App. 128a-130a. The petition argued that accuracy in these matters was important, in light of the fact that "the public record of this case will reflect on the character of the individuals involved." Pet. App. 122a-123a; see also Pet. App. 131a. Finally, the petition argued that the court had erred in concluding *sua sponte* and without citation to any legal authority that attorney's fees for the appeal should be taxed against the government, where taxation of such fees could be justified only on the ground that the appeal was frivolous.[2] See Pet. App. 131a-132a.

The court denied the petition for rehearing. Pet. App. 55a.

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[2] The Fifth Circuit currently has under advisement plaintiffs' petition for an order confirming the award of fees and expenses and setting the amount due, as well as the government's opposition to that petition. The Fifth Circuit thus has not yet reached a final judgment on this matter.

ARGUMENT

1. We agree with petitioner that the court of appeals misstated some facts in this case. The court of appeals made such errors in three portions of its opinion:

First, the court of appeals made some factual errors concerning the contents and significance of the Svede log. The court stated that the Svede log "apparently contained information about remedial actions taken by the USPS in response to Ms. [Chilcutt]'s accident, as well as information on other accidents which occurred at the River Bend location." Pet. App. 5a n.6. See also Pet. App. 16a n.21, 21a. The court also stated that the log would have been useful to plaintiffs because "the same cleaning contractor cleaned all of the post offices in the Fort Worth area and used the same type of wax on all of the floors." Pet. App. 4a n.5.

Those statements were mistaken. Although the Svede log contained information about similar accidents in the lobbies of other post offices in the area,[3] it contained no information about other accidents at the *River Bend* Post Office. The log also contained no information at all about remedial actions taken in response to accidents at any of the post offices. And there was no basis in the record for the statement that the same cleaning contractor cleaned all of the post office floors in the area; deposition testimony not before the court of appeals in fact demonstrated that the contractor who cleaned the River Bend post office floor did not clean any of the other

[3] Petitioner has reprinted one page of the Svede log at Pet. App. 120a. Both pages of the log were included in the record excerpts filed by the government in the court of appeals. See C.A. R.E. 63-66.

facilities mentioned in the Svede log. See Pet. App. 125a-126a & n.3.

Second, in a footnote the court of appeals characterized petitioner as having "presented *no* explanation for his misrepresentation regarding Form 1769." Pet. App. 9a n.13 (emphasis in original). The court commented that the government's denial of the existence of the Form 1769 was "similar to the argument that windmills are dragons" and was a "quixotic" claim. *Ibid.*

In fact, however, the evidence regarding Form 1769 was contradictory. Chilcutt testified that she filled out such a form and gave it to postal employee Iona Smith. A friend of Chilcutt's testified that Chilcutt had picked up a form at the post office and had been authorized to leave work early to return it. On the other hand, Smith denied that Chilcutt had given her such a form (although Smith mentioned that a different form had been filled out). Svede initially testified that a Form 1769 concerning Chilcutt's accident had been filled out and that he had it. June 4 Tr. 89-94. But he later equivocated, stating that "[i]t is just that I *think* that I have seen one" and stating that he did not know when or where he had seen it. June 4 Tr. 100 (emphasis added).

Third, the court stated that there was "ample evidence in the record to support the district court's conclusion that Mr. Svede also engaged in misconduct," and that his "testimony, when considered alone, is incredible." Pet. App. 19a. In fact, the district court's only conclusion with respect to Svede was that he was "basically being honest," although the court "[took] his testimony with a little bit of a grain of salt because of the unlikelihood that he

would remember the details of the things that were said between him and [petitioner]." Pet. App. 114a.

2. The court of appeals also stated that "[t]he [district] court determined that [petitioner] had intentionally misrepresented to the court that Mr. Svede's log did not report Ms. [Chilcutt]'s accident." Pet. App. 10a-11a. The court of appeals at several other places in its opinion mentioned intentional misrepresentation by petitioner, see Pet. App. 2a, 9a, 15a, 16a n.21, 21a.

In our view, the most accurate reading of the July 28 hearing transcript and the subsequent written order issued by the district court is that, although the district court believed that it had ample basis for finding that petitioner had been guilty of intentional misrepresentation with regard to the Svede log—and, indeed, at one point said that "I think it likely, almost a certainty, that [petitioner] was representing to the court intentionally that Mr. Svede's own log didn't report the accident in question," Pet. App. 114a—the court nevertheless did not make an express or formal finding that there had been intentional misrepresentation by petitioner on this issue. Thus, after the closing statement by petitioner's counsel at the July 28 hearing, the court stated that it would provide "some initial reactions." Pet. App. 106a. In the course of those reactions, the court stated, with regard to petitioner's statements about the Svede log, that

> the only conclusions I can reach from what I have heard, either that he just is absolutely totally incompetent or he has made some of the most serious misrepresentations a lawyer can make to a court, representing under his oath, as his words, something that is false.

Pet. App. 108a-109a. In specific response to petitioner's counsel's argument that "[petitioner] didn't

know [what he said] was false," the court expressed skepticism, noting that petitioner "used awful strong language, if he didn't know it was false." Pet. App. 109a. Nevertheless, the court remarked that "maybe that falls in the first category." *Ibid.* The court added: "So I've got a hard decision as to where I go from here. I don't want to embarrass the U.S. Attorney's office." *Ibid.* Ultimately, the district court decided:

> I'm not going to pursue the matter of criminal contempt further. I think that this is a case where a court could find beyond a reasonable doubt the elements of criminal contempt, but I guess, in a sense, I am giving [petitioner] the benefit of the doubt and simply am not going to pursue that.

Pet. App. 116a.

In its July 28 written order, the district court then stated that certain remedies and sanctions were appropriate "whether the conduct [of petitioner] was intentional or grossly negligent." Pet. App. 53a. Thus, although portions of the district court's comments could be read to have constituted a finding of intentional misrepresentation, the court of appeals was inaccurate if it meant to state that the district court had made a formal finding that petitioner had made such intentional misrepresentations.

3. Although the court of appeals' opinion thus contains some errors, summary reversal of its judgment affirming the sanctions imposed on petitioner is not warranted. The validity of the orders that petitioner not be reimbursed for sanctions totalling $3,125 in litigation costs incurred by plaintiffs as a result of petitioner's failures to meet discovery obligations is the only legal issue presently before this Court. The

court of appeals did not rest its affirmance of those nonreimbursement sanction orders on any incorrect findings of fact it made.[4]

The court of appeals began its opinion by distinguishing the two claims before it—one involving sanctions imposed on petitioner personally and the other involving sanctions imposed on the government as a party to the underlying litigation. Thus, the court first stated that, after the discovery dispute arose, the district court had "ordered [petitioner] to personally reimburse the plaintiffs for attorney's fees which arose from the Government's discovery abuse," Pet. App. 1a-2a, and that the district court had later imposed an additional nonreimbursable sanction on petitioner for plaintiffs' costs of attending the June 28 hearing, Pet. App. 11a. Second, the court stated that the district court had "deemed that the liability facts of the plaintiffs' case were established" when "the Government * * * attempted to deceive the court and the plaintiffs." Pet. App. 2a. After reviewing the facts of the case, the court separately discussed the merits of the sanction against the government and the sanctions against petitioner.

With respect to the sanction against the United States, the court plainly relied on its belief that petitioner had engaged in intentional misrepresenta-

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[4] Petitioner cites authority (Pet. 18 n.11) in support of the proposition that, even aside from the nonreimbursement orders, petitioner would have standing to contest the court of appeals' decision based on the damage done to his reputation by the court of appeals' opinion as a whole. But we do not read petitioner to rest his petition on that ground. Even if he did, the question whether petitioner would in fact have standing to challenge the court of appeals' opinion on that ground alone would be at least sufficiently uncertain to preclude summary disposition of this case.

tions.[5] The court catalogued the government's sanctionable conduct as follows: "[T]he Government's flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court." Pet. App. 15a. See generally Pet. App. 12a-23a. The United States has not sought further review in this Court of the court of appeals' affirmance of the sanction against it.

The court of appeals then considered the two nonreimbursable sanctions imposed on petitioner in a section of its opinion entitled "Propriety of Sanctioning Mr. Means." Pet. App. 23a. The court noted that "[petitioner] does not argue that the district court abused its discretion in sanctioning him," but that "by forbidding him from seeking reimbursement from the U.S. Government, the district court violated the separation of powers doctrine." Pet. App. 23a. The court held that the nonreimbursement sanction was authorized by Fed. R. Civ. P. 37, Pet. App. 24a-

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[5] The court stated that the intent of the government was relevant in evaluating the sanction, and found that the government acted intentionally by, *inter alia*, "knowingly ma[king] blatant misrepresentations to the district court." Pet. App. 18a. The court attempted to refute the government's argument that it was not at fault, by making the finding that Svede was complicit in the alleged misconduct and misrepresentation. Pet. App. 19a. The court of appeals found that the district court was justified in deeming the plaintiffs' prima facie case proven, based on the principle that intentional withholding of evidence by the government justified an inference that the evidence would have disclosed a lack of merit in the government's case. Pet. App. 21a. Finally, the court of appeals justified the sanction against the government as necessary for penal purposes because the government's conduct was "willful, contumacious, and flagrant" and because the government was insufficiently "penitent." Pet. App. 22a-23a.

26a, and that "to *restrict* a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine." Pet. App. 27a (footnote omitted) (emphasis in original). See Pet. App. 27a-29a.

The court of appeals did not base its affirmance of the district court's nonreimbursement order either on the factual mistakes the court of appeals made in reviewing the record or on the supposition that the district court made a finding that petitioner had made intentional misrepresentations to the district court. Indeed, the court made clear that it understood that the nonreimbursement orders imposed on petitioner were unrelated to any intentional misrepresentations on his part.

The court of appeals thus explained that a nonreimbursable sanction was imposed on petitioner at the May 22 hearing for "discovery abuse," Pet. App. 2a, to pay for "th[e] deposition costs and all of the attorney's fees and other expenses the plaintiffs had incurred in preparing the [first] motion to compel and the [first] motion for sanctions." Pet. App. 6a.[6] Petitioner's supposed intentional misrepresentations did not occur until the June 4 hearing, about two weeks later, and therefore could not possibly have affected this sanction order. Pet. App. 7a-8a. An additional nonreimbursable sanction was imposed on July 28 "to reimburse [plaintiffs'] counsel for the time she had spent in the hearing." Pet. App. 11a.[7]

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[6] The sanction was imposed at the May 22 hearing, memorialized in a written order on May 26, see Pet. App. 31a-34a, and reduced to a sum certain of $2,500 in a written order on June 2, see Pet. App. 35a-36a.

[7] The amount of that sanction was $625. Pet. App. 54a.

The district court expressly stated that this small additional sanction would be "appropriate," regardless of "whether [petitioner's] conduct was intentional or grossly negligent." Pet. App. 53a.

Thus, the district court clearly did not base either of its two nonreimbursement orders on any facts or assumptions concerning intentional misrepresentations by petitioner. The court of appeals understood that fact, and there is no reason to believe that the court of appeals relied on any intentional misrepresentations by petitioner in adjudicating petitioner's appeal of the nonreimbursement orders.

In distinguishing a case from another circuit, the court of appeals remarked that "this district court's primary reason in precluding [petitioner] * * * from seeking reimbursement was to punish [petitioner] for his flagrant disregard of his discovery obligations." Pet. App. 27a n.35. That reference to "flagrant disregard of discovery obligations," however, apparently did not refer to intentional misrepresentations made by petitioner to the district court, but to his disregard of discovery obligations by failing to adhere to discovery time schedules and by his incomplete responses to discovery requests. Indeed, elsewhere in its opinion, the court of appeals referred to failures to comply with discovery obligations and intentional misrepresentations as constituting distinct types of violations.[8] And neither petitioner nor the United States contested the basic facts that presumably led the court of appeals to charac-

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[8] See Pet. App. 2a (referring to government's having "disobeyed the district court's order to fulfill its discovery obligations and attempted to deceive the court and the plaintiffs"), 15a (referring to government's "flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court").

terize petitioner's actions as amounting to "flagrant disregard of discovery obligations." Those included the failure of the government to produce any discovery at all until May 19, 1992, approximately one month after the April 23 due date under the discovery rules, and its failure to produce complete discovery responses even at that late date.

Petitioner does not seek certiorari to address the separation of powers concerns that were the basis of the government's argument in the court of appeals against affirmance of the non-reimbursement order. Those concerns would not, in any event, lend themselves to summary disposition by this Court. On the other hand, petitioner "readily admits that he erred badly in failing to attend to discovery deadlines." Pet. 18 n.11. As shown above, it appears that the sanctions imposed on petitioner were based on that failure, and not on any of the appeals court's factual misapprehensions. Accordingly, we do not believe that the question presented warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301137 86212

Supreme Court, U.S.
FILED
SEP 28 1994
OFFICE OF THE CLERK

No. 93-1663

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RANDELL P. MEANS,
Petitioner,

v.

BRENDA CHILCUTT WORTHAM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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September 28, 1994

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REPLY BRIEF FOR THE PETITIONER

This case obviously poses a difficult problem for the United States. In the court of appeals, the Department of Justice condemned the panel's holding against petitioner in categorical terms. Having declined to petition this Court on his behalf, the United States sought to avoid the matter by waiving its right to file a brief as a nominal respondent. After the Court requested a response, the government obtained three extensions of time. Now the Department of Justice tells this Court that there has been a clear error of law and admits that a government attorney's professional reputation has been destroyed by the error. The proper disposition of the petition follows directly from these two conclusions, *viz.*, the petition should be granted, the judgment should be vacated and the matter should be remanded so that the court of appeals can correct the errors in its opinion.

The United States nonetheless opines that the Court need not concern itself with the harmful consequences of the court of appeals' errors solely on the basis of an artificial reading of the opinion below that is at best doubtful and at worst wholly inconsistent with both a common sense and a plain reading of the entire opinion. As we demonstrate below, however, there is no good reason to turn a blind eye to petitioner's situation.

1. The United States agrees (Br. in Opp. 18-21) that the court of appeals committed fundamental legal error by making factual findings never made by the district court. Thus, the United States describes a litany of factual conclusions in the court of appeals' opinion that it agrees are demonstrably and indisputably wrong. Moreover, there can be no disputing that the court of appeals ventured off on its own in making these incorrect factual findings. On the most fundamental factual dispute—whether petitioner hid the Svede log and then lied about it before the district court—the United States clearly states (Br. in Opp. 20-21) that the district court

made *no* finding whatsoever. There is simply no question in this case that the court of appeals exceeded its proper role in reaching factual conclusions on disputed matters that the district court did not resolve.[1]

This case thus presents an extraordinary situation: The court of appeals not only deemed it appropriate to take on the role of the district court—in flat contradiction of settled law from this Court, see, *e.g.*, *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986)—but it erred grievously in discharging its self-appointed role as finder of fact. This process has done immeasurable harm to the reputation of petitioner, an Assistant United States Attorney who has performed more than ten years of public service.

In view of the United States' agreement that the factual conclusions reached by the court of appeals, as well as

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[1] Although the United States agrees (Br. in Opp. 20) that the district court made no findings of intentional misconduct, it nonetheless describes (*id.* at 2-12) at length the proceedings in the district court and several of the district court's most caustic comments. The United States suggests that the district court believed it had ample basis for making such a finding, and refers to some comments made by the court to that effect. Br. in Opp. at 20. But the undisputed fact remains that the district court declined to make any such findings, and resolved the case on the explicit premise that it was *not* making a factual finding of intentional misconduct. *See* Pet. App. 53a. It is worth noting, moreover, that the district court in this case has not in the past shied away from imposing its own views of orderly procedure on the government. *See In re Stone*, 986 F.2d 898 (5th Cir. 1993). It is precisely in this sort of situation that a court of appeals should be loathe to upset the district court's decision not to make a factual finding that will effectively destroy a public servant's career.

As matters stand, however, the district court's decision to refrain from making any factual findings has worked to petitioner's serious disadvantage. Because the court of appeals made factual findings on its own, petitioner is left in the position of seeking this Court's intervention if he is to have any meaningful review of the facts found against him. Given that the findings made by the court of appeals are demonstrably wrong, to deprive petitioner of any review of those findings is particularly unjust. *See* Fed. R. Civ. P. 52(a).

the process that led to them, were fundamentally wrong, petitioner expected the Department of Justice to support his effort in this Court to restore his reputation. That expectation was reinforced by several additional factors: First, two leading groups of prosecutors, the National Association of Assistant United States Attorneys and the Federal Bar Association, filed *amicus* briefs in support of the petition, urging summary reversal to protect their professional interests. Second, 403 Department of Justice attorneys from all over the country were concerned enough about petitioner's plight to file in their individual capacities an *amicus* brief in support of the petition. The remarkable effort highlights the widespread perception by government lawyers that courts are increasingly and unjustifiably quick to conclude that government counsel have engaged in misconduct. It is just an accident of circumstance that petitioner, and not one of his *amici*, is before this Court with his reputation unjustly destroyed.[2] In light of these factors—as well as the strong view of the merits of this case previously expressed by the Department of Justice in the court of appeals (see Pet. App. 121a-33a), and the incalculable harm caused to petitioner by the court of appeals' plain legal error—the proper course would have been for the United States to urge that the error be recognized, the judgment vacated and the matter remanded to the court of appeals.

2. The United States, however, filed a brief opposing petitioner's effort to get back his good name. The willingness of the Department of Justice to blind itself to a fundamental error destroying the reputation of one of its

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[2] It is fair to say that the United States' brief in this case will provide little comfort to the rank and file attorneys who litigate on its behalf every day and who fear that petitioner's fate—caused essentially by the failure of his client's representative, Mr. Svede, to recall in a timely fashion the existence of an innocuous document that no rational person would seek to hide—could befall them at any time. The United States fails even to acknowledge the *amicus* briefs filed on petitioner's behalf, much less to address the concerns expressed in those briefs over the impact of the decision below on government litigators generally.

lawyers is disappointing. But even more disturbing is the unpersuasive reasoning adopted by the United States.

The United States argues (Br. in Opp. 21-22) that the court of appeals did not rest its affirmance of the non-reimbursement sanction against petitioner on its incorrect factual finding that petitioner engaged in willful misconduct, and that the factual errors in the opinion below therefore were in effect "harmless," *i.e.*, made no difference in the resolution of the legal issue before this Court. The United States argues that the devastating harm to petitioner's reputation inflicted by the court of appeals somehow does not count because the court's findings concerning his supposed intentional misconduct were made solely in the course of affirming the separate sanctions imposed by the district court against the United States. See Br. in Opp. 22-24. Not only does this analysis elevate form over substance, but it also cannot be squared with the holding below.

a. Even on the face of the court of appeals' opinion, it is not true that the court made its factual findings with respect to petitioner's supposed intentional misconduct only with respect to the sanctions against the United States. First, the court of appeals described its findings concerning petitioner's "misconduct" in its general description of the case. See Pet. App. 2a, 9a & n.13. Moreover, the court of appeals' discussion of the basis on which it upheld petitioner's sanction is at best murky. It is clear, however, that the court condemned petitioner for his "flagrant disregard of his discovery obligations." Pet. App. 27a n.35. This is the same language that the court of appeals twice used in the earlier portion of the opinion in finding that petitioner intentionally misled the district court. Pet. App. 10a. Moreover, as the court of appeals' citation to the district court record, see *id.*, suggests, this phrase had its genesis in the trial judge's opening remarks at the July 28 hearing, where the court expressed concern about its suspicion that petitioner concealed the Svede log, and termed this a "rather flagrant violation of

the discovery obligations." Pet. App. 53a.[3] Nonetheless, the United States urges (Br. in Opp. 25 n.8) a more benign interpretation of the court of appeals' opinion. It asserts that the court of appeals' discussion should be read as merely reflecting petitioner's failure to respond timely to discovery requests.

The government's submission is completely untenable when analyzed with respect to the court of appeals' discussion rejecting petitioner's separation of powers argument. In rejecting the argument that the non-reimbursement sanction improperly interfered in internal Department of Justice matters, the court of appeals relied upon the inherent power of the federal courts to punish *contempt* and specifically noted the historic power of the courts "to punish *willful* infractions" offending the authority of the courts. Pet. App. 28a & n.38 (emphasis added). To accept petitioner's argument, the court of appeals stated, would rob the federal courts of these historic powers when dealing with government attorneys. Pet. App. 27a-28a.

If the court of appeals was not relying on its findings of intentional misconduct in affirming the non-reimbursement sanction against petitioner, there was no reason to rely upon, or even mention, the power of the federal courts to punish willful contempt of court. In fact, however, there was good reason for the court to address the inherent powers of the federal courts. The July 28 order of the district court requiring petitioner to pay plaintiff's counsel the costs of attending the show cause hearing and not to seek reimbursement of those costs was based on the court's inherent powers.[4] Under settled law, a trial

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[3] We reiterate that the district court, despite its initial concern, declined to make any finding at the end of the proceedings that petitioner engaged in intentional misconduct of any sort.

[4] Prior to the July 28 hearing, it was at least ambiguous whether the district court was relying on Fed. R. Civ. P. 37 as the source of its authority for its various sanctions orders, or whether it was also relying on its inherent powers. In the July 1 order setting the hearing to show cause, however, the district court plainly adverted

court finding that "counsel's conduct . . . constituted or was tantamount to bad faith . . . would have to precede any sanction under the court's inherent powers." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 765, 767 (1980). See also *Resolution Trust Corp.* v. *Bright*, 6 F.3d 336, 340 (5th Cir. 1993); *Matter of Thalheim*, 853 F.2d 383, 389 (5th Cir. 1988). When faced with bad faith conduct by government lawyers, the court of appeals held, the separation of powers cannot impede the courts' historic inherent power to punish intentional wrongdoing. Pet. App. 28a-29a. Thus, when the opinion is understood in context, there is no question that the court of appeals affirmed petitioner's non-reimbursement sanction because *it* found that petitioner acted intentionally.

b. In the end, the United States urges on this Court a view of the court of appeals' conduct in this case that is simply unreasonable. The United States agrees that the court of appeals made improper factual findings, and that those factual findings formed the basis for affirming the sanctions against the United States. Br. in Opp. 22-23. In affirming the sanctions against petitioner, however, the United States takes the view that the court of appeals completely shifted gears and relied exclusively on the district court's conclusion that petitioner was late and sloppy with his discovery responses. For the court of appeals to affirm the non-reimbursement sanction in the manner posited by the United States, it would have had to disregard the briefs and arguments of the Department of Justice, which focused on the district court's failure to find the willful misconduct that was the necessary predicate to support the sanctions against *both* petitioner and the United States. See Brief for Appellants 19-24, 33-42

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to its inherent powers, and did not mention Rule 37. Pet. App. 51a-52a. The July 28 order entering a new non-reimbursement sanction against petitioner did not mention Rule 37 or any other explicit source of authority, no doubt because judgment had been entered and discovery was no longer at issue. The only source of authority for that order was the district court's inherent powers.

(5th Cir. No. 92-1668).[5] The court of appeals would also have had to flout settled law requiring a finding of bad faith to support the non-reimbursement sanction. And it would have had to do this immediately after affirming the sanctions against the United States based on its factual conclusion, stated in the most severe terms possible, that petitioner intentionally withheld documents and then lied to the district court in an effort to cover up his treachery. Contrary to the submission of the United States, it is simply unrealistic to think that the court of appeals took no account of those findings of misconduct in affirming the sanctions against petitioner.

3. In any event, the effort of the United States to avoid the problem in this case by advancing a hypertechnical and artificial reading of the court of appeals' opinion is beside the point. As we indicated in the Petition (Pet. 18 n.11, 23-24), even putting aside the non-reimbursement sanction, the harm to petitioner's reputation caused by the court of appeals' factual findings provides a sufficient basis for reversal of the opinion below. Indeed, the Department of Justice itself emphasized before the court of appeals that the harm caused to petitioner's reputation by the factual misstatements in the opinion provided an independent basis for altering the opinion. See Pet. App. 122a-23a, 131a.

In this Court, however, the United States suggests (Br. in Opp. 22 n.4) that there is some uncertainty over whether petitioner has standing to challenge the decision below on the ground that it harms his reputation, and

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[5] It is not surprising that the court of appeals chose to resolve the intentional misconduct point in the portion of its opinion dealing with the sanction against the United States, since the Department of Justice's brief made the argument that no intentional misconduct occurred solely in the context of arguing that the sanctions against the United States were unduly severe. In the portion of the brief dealing with petitioner's non-reimbursement sanction, the Department of Justice took as a premise that no intentional misconduct occurred and was content simply to refer to the earlier discussion in its brief. *See* Brief for Appellants 33-42.

that summary reversal to correct the conceded and egregious errors of the court of appeals is unwarranted. In the first place, it is beyond dispute that the $625 sanction levied *after* the July 28 hearing had nothing to do with petitioner's initial failure to respond adequately to plaintiffs' discovery requests; as we have noted, that sanction had to be based on the district court's inherent authority, and petitioner undoubtedly has standing to challenge the court of appeals' affirmance of the sanction based on its own factual findings of intentional misconduct.[6] But even if that were wrong, petitioner is nonetheless fully entitled to challenge the decision below solely on the basis of the harm done to his reputation.[7]

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[6] The United States contends (Br. in Opp. 25) that the "district court clearly did not base" its non-reimbursement order with respect to the $625 sanction "on any facts or assumptions concerning intentional misrepresentations by petitioner," and asserts that "the court of appeals understood that fact." That is precisely our point: The district court failed to make any findings of intentional misconduct; in the absence of those findings, and in order to uphold the sanction against petitioner, *the court of appeals simply made the necessary findings on its own*; and it is that improper process that petitioner challenges in this Court. It is plain, in any event, that the $625 sanction is ample basis to provide the injury required to sustain his petitioner's standing.

[7] Because the United States fails to cite any authority in support of its view, it is unclear what it sees as the nature or source of uncertainty over petitioner's standing. As we show below, there is no doubt on these facts that petitioner meets both the constitutional and statutory tests for standing. Although some courts have refused to permit attorneys to appeal decisions on the ground of reputational harm, *see, e.g., Bolte* v. *Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984), those decisions were based on the ground that mandamus, and not appeal, was the appropriate procedure to follow for an attorney who was not a party to the proceedings and whose only part in the case was to be criticized in an opinion that was not otherwise appealable. *Cf. Penthouse Int'l, Ltd.* v. *Playboy Enterprises*, 663 F.2d 371 (2d Cir. 1981) (granting aggrieved attorney right to intervene as a party on appeal). In this case, petitioner's statutory standing was unchallenged below, and there is no doubt that he is properly before this Court as a party. Nor have we found authority to the effect that injuries to an attorney's reputation cannot form the basis for Article III standing. Although the

First, it is clear that "published opinions chastising [counsel] by name" constitute a "serious sanction." *United States* v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). See also Pet. 18 n.11; William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985) (judges should recognize that "public criticism delivered from the bench" can "damage a lawyer's reputation and career"). As a common sense matter, it is not difficult to see that the factual findings made by the court of appeals have caused petitioner injury and that a reversal by this Court would redress that injury. Thus, petitioner meets the constitutional requirements for standing. See *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

Nor is there any doubt that, as a statutory matter, petitioner is properly before this Court as a party. Petitioner was a party to the appeal under 28 U.S.C. § 1291, and the propriety of his party status has never been challenged at any point. As a party to the case, he is plainly entitled to seek certiorari in this Court pursuant to 28 U.S.C. § 1254.

In short, this Court is fully empowered to reverse the decision below on the ground that its improper factual findings have grievously harmed petitioner's reputation.

4. As we have demonstrated, the submission of the United States is at odds with the court of appeals' opinion on its face, and with any realistic view of the decision-making process below. Indeed, there is something of an Alice-In-Wonderland flavor to the government's position—urging this Court not to concern itself with the errors

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Seventh Circuit has suggested that speculative harm to an attorney's reputation is not a sufficient injury, *see Clark Equip. Co.* v. *Lift Parts, Mfg. Co.*, 972 F.2d 817 (7th Cir. 1992), even that court recognizes that an opinion that is "in substance or tone, of an inherently injurious nature," can provide the concrete harm necessary to establish standing. *Barnhill* v. *United States*, 11 F.3d 1360, 1371 (7th Cir. 1993). *See also Clark*, 972 F.2d at 820.

committed below because they made no difference to the outcome of petitioner's case, even though any cursory examination of the opinion readily reveals the egregious harm the opinion has in fact caused petitioner.

We can only reiterate that this is an extraordinary case of fundamental legal error. Petitioner has been found guilty, by a procedure that this Court condemned in *Icicle Seafoods, supra,* of withholding documents and conspiring with a Postal Service employee to cover up the deceit. The opinion below should be vacated, and the case should be remanded to the court of appeals for it to decide—without engaging in appellate fact-finding—whether the non-reimbursement sanction against petitioner can stand in the absence of a finding of intentional misconduct by the district court. Summary reversal is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

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September 28, 1994

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